Supreme Court, U.S.
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In The

Supreme Court of the United States

THE STATE OF TEXAS,

Petitioner,

v.

RAUL ADAM MARTINEZ, JR.,

Respondent.

On Petition For A Writ Of Certiorari To The Texas Court Of Criminal Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the subjective intent of an interrogating officer is relevant to the analysis under *Missouri v. Seibert* when a suspect in custody discusses the case both before and after receiving *Miranda* warnings.

2. Whether statements uttered during the course of a pre-warning polygraph examination are material to the analysis under *Missouri v. Seibert* when a suspect in custody discusses the case both before and after receiving *Miranda* warnings.

3. Whether a magistrate's issuance of *Miranda* warnings between a pre-warning polygraph examination at one location and a post-warning videotaped statement at another location operates as a sufficient break in continuity for the purposes of *Missouri v. Seibert*.

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

CITATIONS OF OPINIONS

Martinez v. Texas, 272 S.W.3d 615 (Tex. Crim. App. 2008).

Martinez v. Texas, 204 S.W.3d 914 (Tex. App. – Corpus Christi 2006).

STATEMENT OF JURISDICTION

The respondent was charged with capital murder, found guilty by a jury, and sentenced to life in prison (CR – 14, 165). He appealed the ruling on his pre-trial motion to suppress his videotaped statement, and the intermediate appellate court affirmed the conviction based on this Court's plurality opinion in *Missouri v. Seibert*, 542 U.S. 600 (2004). *Martinez v. Texas*, 204 S.W.3d 914 (Tex. App. – Corpus Christi, 2006) (App. 68). On December 17, 2008, the Texas Court of Criminal Appeals reversed the conviction based on Justice Kennedy's concurring opinion in *Seibert*. *Martinez v. Texas*, 272 S.W.3d 615 (Tex. Crim. App. 2008) (App. 1). No motion for rehearing was filed. This petition is timely if filed by March 17, 2009. SUP. CT. R. 13(1). This Court has jurisdiction to hear the case because the respondent asserted a right under the United States Constitution. *See* 28 U.S.C. § 1257(a) (providing for jurisdiction "where any title, right, privilege, or immunity is specially set up or claimed under the

Constitution."). Specifically, the respondent has claimed in every court that the admission of his videotaped statement violated his rights under the Fifth Amendment to the United States Constitution. While the case was remanded for a harm analysis, the most recent decision is final on the constitutional issues. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 481 (1975) (recognizing an exception to the finality requirement "where the federal claim has been finally decided, with further proceedings in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case.").

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. U.S. CONST. amend. V.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President

and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article. U.S. CONST. amend. XIV.

STATEMENT OF THE CASE

A. Facts of the Offense and Police Investigation

In the early morning hours of August 3, 2002, Alfredo Loredo was socializing in his apartment complex with his friends Gustavo Camilo and Manuel Molina (RR. IV – 129-130, 174). They were in the parking lot, talking and drinking beer, but they were not intoxicated (RR. IV – 130, 174-175). All three men had been paid that day (RR. IV – 140-141, 176).

Sometime that evening, Raul Martinez, the respondent, and a man named James Ruiz approached with guns (RR. IV – 135-136, 148-155). The respondent and his companion announced that it was a robbery, and the three victims raised their hands up in the air (RR. IV – 179). Camilo gave his wallet containing $1,200 to the respondent; however, Camilo was shot in the stomach when he started moving (RR. IV – 137, 140, 175, 184, 187, 189). The respondent stuck the rifle or shotgun into Loredo's belly and asked for money (RR. IV – 136, 179-180). Loredo moved to the side and Molina came over to help him (RR. IV – 136-137). The respondent shouted to Ruiz to shoot, and another shot was fired (RR. IV – 183). Molina was hit and fell to the ground; he died from his wounds the next morning (RR. IV – 137) (RR. V – 51). Ruiz then took Molina's wallet (RR. IV – 140, 184-185).

The robbers knocked Loredo to the ground and stole his wallet, which included his license, bankcard,

and $400 in cash (RR. IV – 138-140). Before the robbers left, they shot Loredo in the neck (RR. IV – 41, 138-139). The respondent and Ruiz returned to their car and drove away with the lights off (RR. IV – 102-106, 122-124, 127-128). Luckily, Loredo was wearing a cell phone, so he called his brother-in-law, who in turn called the police (RR. IV – 141).

Marcario Sosa with the Houston Police Department's homicide division was assigned to the case; he requested a composite sketch from Loredo's description, and eventually got a tip, which allowed him to assemble some photo lineups (RR. V – 72-73). Loredo and Camilo identified both the respondent and Ruiz from the photo lineups (RR. IV –148-153, 195-198) (RR. V – 73-83). Sosa obtained an arrest warrant for the respondent, and the respondent gave a videotaped statement (RR. V – 85-93). The respondent was charged with capital murder.

B. Motion to Suppress Respondent's Videotaped Statement

The respondent filed a boilerplate pre-trial motion to suppress his written and oral statements (CR – 45). The motion claimed that the respondent's statements were involuntary, were not properly admonished, and were the result of custodial interrogations in violation of the Fifth and Fourteenth Amendments to the United States Constitution, among other provisions (CR – 45-47).

Detective Sosa was the sole witness at the hearing on that motion (RR. III – 3). He testified about the progress and direction of the investigation from the shooting itself to the point at which he secured a warrant for the respondent's arrest (RR. III – 7-15). Sosa was alone when he arrested the respondent in the parking lot of a convenience store between 10:00 a.m. and noon (RR. III – 16-18, 32). Sosa told the respondent that he was under arrest for capital murder, but Sosa "didn't go into any details or anything." (RR. III – 32-33, 39).

Sosa took the respondent to the police station at 1200 Travis in downtown Houston where he and his partner had a brief general conversation with the respondent regarding the incident (RR. III – 19, 33). Sosa asked the respondent if he wanted to speak with them, but the respondent claimed that he did not know anything about the situation (RR. III – 34). Sosa then arranged for the respondent to take a polygraph examination, which was a routine tool in Sosa's investigations (RR. III – 19, 34-35, 41). The respondent was allowed to go to the bathroom and was given a cheeseburger and some lemonade (RR. III – 20, 37). He was allowed to use the telephone; he called his father before making his statement, and he called his girlfriend after making his statement (RR. III – 27) (St. Ex. 1A).

The polygraph examiner informed Sosa that there was "an area of deception." (RR. III – 45). At approximately 4:55 p.m., Sosa took the respondent to a magistrate at the municipal court at 1400 Lubbock,

at which time the respondent was given his statutory and constitutional warnings (RR. III – 43, 45). Sosa then placed the respondent in an interview room at the central hold area at 61 Reisner, which is northwest of downtown Houston; there he read the respondent his statutory warnings and secured a waiver of those rights (RR. III – 18-24, 46-47). The respondent gave a lengthy statement that was recorded on videotape (RR. III – 25) (St. Ex. 1, 1A).

The respondent gave at least five different versions of the offense in his statement (RR. V – 98-99). In the beginning, he claimed that there were three individuals involved in the robbery, but later stated that four were involved (RR. V – 99) (St. Ex. 1A). Sometimes the respondent claimed that Fabian Montes was driving, and sometimes he claimed that Luis Martinez was driving (St. Ex. 1A). Sometimes the respondent claimed that he heard three gunshots; another time he claimed that he did not hear any gunshots (St. Ex. 1A). The respondent placed himself at the location of the murder near the time of the murder; however, he claimed that he remained inside the vehicle as the lookout (RR. V – 100-101).

At the conclusion of the suppression hearing, the trial court denied the respondent's motion in the following exchange, which includes all of the respondent's argument during that hearing:

> Ms. Reagin: Your Honor, just preliminarily, we note the lack of an expressed waiver of rights at the beginning of the

videotape basically with the detective, knowing these rights, do you want to talk? There is no express waiver of the rights; however, more importantly, we ask you to consider the day-long worth of activities that seem to be quite vague in Detective Sosa's mind, the lack of any record-keeping, the inability to explain what's been going on, what was talked about all day long, the lack, most importantly, of any reading of rights or *Miranda* warnings during all the questioning that occurred throughout the day by the polygraph examiner and then through these huge blanks of time up until the trip to the magistrate, which did not occur until almost 5:00 o'clock.

We submit those are not sufficient intervening circumstances to remove any taint. First of all, the lack of warnings before the day's questioning and then on the tape itself. We urge you to consider the coercive techniques that are used, the argumentation of Mr. Martinez's refusal to accept his denials of guilt, the suggestion made that there is evidence that exists when it doesn't truly exist and so forth. And we also urge you to consider Detective Sosa's lack of memory concerning the events surrounding the taking of the statement also raise some question about the credibility involved with regard to what he says about what was done. We urge you to suppress the statement.

The Court: I am going to admit the statement. I make a specific finding I have

> found Officer Sosa to be a credible witness. The arrest warrant is a good arrest warrant. It appeared that the defendant did freely, voluntarily and knowingly waive his rights to remain silent and give that statement. There was no testimony of any threats. The behavior of Officer Sosa appears to be exemplary and it is admitted.

(RR. III – 60-61). When a redacted version of the respondent's videotaped statement was offered during the trial, the respondent re-urged the objection and for the first time mentioned "Missouri v. Seibert," which was then pending in this Court (RR. V – 94-95). The trial court again overruled the objection (RR. V – 95).

C. Appeal to the Intermediate State Court

The respondent appealed his conviction, and the case was transferred to the Court of Appeals for the Thirteenth District of Texas at Corpus Christi. *Martinez*, 204 S.W.3d at 914. The respondent argued on appeal that his constitutional rights were violated and cited *Missouri v. Seibert*, 93 S.W.3d 700 (Mo. 2002). Ten days after the respondent filed his brief, this Court affirmed the lower court's reversal in *Seibert*. The Thirteenth Court of Appeals based its analysis on this Court's plurality opinion in *Missouri v. Seibert*, 542 U.S. 600 (2004), and affirmed the conviction, holding that the respondent had voluntarily waived his constitutional rights. *Martinez*, 204 S.W.3d at 918-922.

D. Appeal to the State Court of Last Resort

The Texas Court of Criminal Appeals granted discretionary review and, in a five-to-four decision, reversed the ruling of the lower appellate court. The Texas Court of Criminal Appeals based its decision on Justice Kennedy's concurring opinion in *Seibert*. *Martinez*, 272 S.W.3d at 621. The court held that the respondent's videotaped statement was inadmissible because police officers violated the respondent's *Miranda* rights. *Martinez*, 272 S.W.3d at 627. While that court remanded to the lower appellate court for a harm analysis, its opinion was final on the admissibility of the respondent's statement and on the violation of his constitutional rights. *See Cox Broadcasting*, 420 U.S. at 481 (recognizing an exception to the finality requirement "where the federal claim has been finally decided, with further proceedings in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case.").

ARGUMENT

The Texas Court of Criminal Appeals reversed the conviction in this case, holding that the interrogating officer used a two-step interrogation technique in a "calculated way" to overcome the protections of *Miranda v. Arizona*, 384 U.S. 436 (1966). *Martinez*, 272 S.W.3d at 623. But that court misapplied this Court's reasoning in *Missouri v. Seibert*, 542 U.S. 600

(2004), in which seven Justices rejected the relevance of the interrogator's subjective intent. The Texas Court of Criminal Appeals also stated that the substance of the respondent's pre-warning statement was "immaterial" in a *Seibert* analysis. *Martinez*, 272 S.W.3d at 624. But the focus in *Seibert* was the use of pre-warning statements to extract post-warning statements. And whether that was done cannot be determined without a record of the substance of those pre-warning statements, which was never developed in the present case. Finally, the Texas Court of Criminal Appeals held that there were no curative measures in the present case. *Martinez*, 272 S.W.3d at 627. But the respondent received his *Miranda* warnings from a magistrate in between his pre-warning polygraph examination at one location and his post-warning videotaped statement at another location. Therefore, this Court should grant review to clarify and correct the analyses used by the Texas Court of Criminal Appeals.

A. The subjective intent of an interrogating officer is irrelevant to the analysis under *Missouri v. Seibert*.

This Court's first seminal opinion to address "midstream" *Miranda* warnings was *Oregon v. Elstad*, 470 U.S. 298 (1985). In that case, the officers went to the 18-year-old defendant's home with a warrant for his arrest. *Id.*, 470 U.S. at 300. Elstad's mother answered the door and led the officers to her son's room where he lay on his bed, wearing shorts

and listening to his stereo. *Id.* The officers asked him to get dressed and to accompany them into the living room where they asked him whether he was involved in the robbery at a neighbor's house. *Id.*, 470 U.S. at 300-301. Elstad looked at the officer and stated, "Yes, I was there." *Id.* The officers then took Elstad down to the police station and, one hour later, read him his *Miranda* warnings. *Id.*, 470 U.S. at 301. Elstad waived his rights and gave a full written statement about the robbery. *Id.* At trial, the pre-*Miranda* oral statement was excluded, but the written statement was admitted, and Elstad was convicted. *Id.* The Oregon Court of Appeals reversed the conviction, stating that the "cat was sufficiently out of the bag to exert a coercive impact on [respondent's] later admissions," and this Court granted review. *Id.*, 470 U.S. at 302-303.

In a six-to-three decision, this Court held that, although a *Miranda* violation made the first statement inadmissible, the post-warning statements could be introduced against the accused because "neither the general goal of deterring improper police conduct nor the Fifth Amendment goal of assuring trustworthy evidence would be served by suppression" given the facts of that case. *Elstad*, 470 U.S. at 308 (citing *Michigan v. Tucker*, 417 U.S. 433, 445 (1974)). In reversing the Oregon court, this Court rejected both the "fruit of the poisonous tree" and the "cat out of the bag" arguments. *Elstad*, 470 U.S. at 303-317.

The *Elstad* Court noted that although the warnings were belated, they were "undeniably complete," and neither the environment nor the manner of either interrogation was coercive. *Id.*, 470 U.S. at 314-315. This Court also noted that the officers did not exploit the pre-warning admission to pressure the defendant into waiving his right to remain silent. *Id.*, 470 U.S. at 316. This Court concluded, "We hold today that a suspect who has once responded to prewarning yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite *Miranda* warnings." *Id.*, 470 U.S. at 318.

This Court readdressed the issue approximately 20 years later. In *Missouri v. Seibert*, 542 U.S. 600, 604 (2004), the defendant feared charges of neglect when her son, who was afflicted with cerebral palsy, died in his sleep. She was present when two of her other sons and their friends discussed burning her family's mobile home to conceal the circumstances of her son's death. *Id.* The defendant's son and a friend set fire to the home and left Donald, an unrelated mentally-ill 18-year-old living with the family, to die in the fire in order to avoid the appearance that Seibert's son had been unattended. *Id.*, 542 U.S. at 604-605.

Five days after the fire, the police arrested Seibert, but did not inform her of her rights under *Miranda*. *Id.*, 542 U.S. at 605. At the police station, Officer Hanrahan questioned her for 30 to 40 minutes during which he squeezed her arm and obtained a

confession that the plan was for Donald to die in the fire. *Id.* Hanrahan then gave Seibert a 20-minute break, returned to give her *Miranda* warnings, and obtained a signed waiver. *Id.* He resumed questioning, confronting Seibert with her pre-warning statements and getting her to repeat the information. *Id.*

At trial, Seibert moved to suppress both her pre-warning and post-warning statements. *Id.* Hanrahan testified that he made a conscious decision to withhold *Miranda* warnings, question first, then give the warnings, and then repeat the question until he got the answer previously given. *Id.* The District Court suppressed the pre-warning statement but admitted the post-warning one, and Seibert was convicted of second-degree murder. *Id.* The Missouri Supreme Court reversed, holding that the second statement was clearly the product of the invalid first statement, and distinguished *Elstad* on the ground that the warnings had not intentionally been withheld in that case. *Id.*, 542 U.S. at 607-608.

This Court granted certiorari and, in a vote with no majority opinion, held that the second confession was inadmissible. *Id.*, 542 U.S. 608-617. The four-Justice plurality opinion distinguished *Elstad* in the context of the following test to determine whether *Miranda* warnings delivered midstream could be effective enough to accomplish their object:

> [(1)] the completeness and detail of the questions and answers in the first round of interrogation,

> [(2)] the overlapping content of the two statements,
>
> [(3)] the timing and setting of the first and the second [statements],
>
> [(4)] the continuity of police personnel, and
>
> [(5)] the degree to which the interrogator's questions treated the second round as continuous with the first.

Id., 542 U.S. at 615. The *Seibert* plurality further distinguished *Elstad* by stating that "since a reasonable person in [Elstad]'s shoes could have seen the station house questioning as a new and distinct experience, the *Miranda* warnings could have made sense as presenting a genuine choice whether to follow up on the earlier admission." *Id.*, 542 U.S. at 615-616. The plurality then stated:

> At the opposite extreme are the facts here, which by any objective measure reveal a police strategy adapted to undermine the *Miranda* warnings. The unwarned interrogation was conducted in the station house, and the questioning was systematic, exhaustive, and managed with psychological skill. *When the police were finished there was little, if anything, of incriminating potential left unsaid.*

Id. (footnote omitted) (emphasis added). The *Seibert* plurality concluded that a reasonable person would regard the second questioning as a continuation of

the earlier questions especially in light of the fact that the responses during the second session were fostered by references back to the confession already given. *Id.*, 542 U.S. at 617.

The four-Justice dissent in *Seibert* joined the plurality insofar as it refused to follow the "fruit of the poisonous tree" theory in the context of *Miranda* requirements. *Id.*, 542 U.S. at 623 (O'Connor, J., dissenting). The dissent also joined the plurality insofar as it refused to focus on the subjective intent of the interrogating officer. *Id.* But the dissent stated that the plurality should have analyzed the issue in terms of voluntariness under the Fifth Amendment, and should have determined whether any taint had dissipated by a change in time or circumstances. *Id.*, 542 U.S. at 627-628.

There were two concurring opinions in *Seibert*. Justice Breyer joined the plurality; however, he wrote separately to say that he subscribed to the "fruit of the poisonous tree" theory unless the failure to warn was in good faith and that he believed the plurality's approach would be the functional equivalent of such a test. *Id.*, 542 U.S. at 617-618 (Breyer, J., concurring). Justice Kennedy on the other hand rejected the "fruit of the poisonous tree" approach, but he also rejected the completely objective tests that were championed by both the plurality and the dissent. *Id.*, 542 U.S. at 619-622 (Kennedy, J., concurring). Instead, Justice Kennedy argued that *Elstad* controlled unless there was a subjectively deliberate two-step strategy to undermine *Miranda*; if there was a

deliberate two-step strategy, then the evidence must be excluded unless curative measures were taken. *Id.*, 542 U.S. at 622 (Kennedy, J., concurring). Curative measures included "a substantial break in time and circumstances" between the two statements to allow the "accused to distinguish the two contexts and appreciate that the interrogation has taken a new turn." *Id.* Justice Kennedy agreed that Seibert's statement should be suppressed, but based on completely different logic than that used by the plurality. *Id.*, 542 U.S. at 619-22 (Kennedy, J., concurring).

One of the first challenges in the application of *Seibert* is the determination of the holding in the case. In *Marks v. United States*, 430 U.S. 188, 193 (1977), this Court stated that ordinarily, where "a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." But the *Marks* rule produces a determinate holding only when one opinion is a logical subset of other, broader opinions. *Martinez*, 204 S.W.3d at 918 (citing *United States v. Carrizales-Toledo*, 454 F.3d 1142, 1151 (10th Cir. 2006)).

In the present case, the Texas Court of Criminal Appeals claimed that Justice Kennedy's concurrence "took a narrower view," namely that *Elstad* should be followed "unless there is proof that the interrogating officer knowingly and willing[ly] utilized the two-stage technique." *Martinez*, 272 S.W.3d at 620. That

court then applied Justice Kennedy's opinion as if it were the holding of the Court. *Martinez*, 272 S.W.3d at 621. But a careful reading of *Seibert* reveals that Justice Kennedy's subjective test was not adopted by any of the other Justices. In fact, seven other Justices flatly rejected such a subjective element; only Justice Breyer would have joined Justice Kennedy in the subjective waters with his "good faith" element. Furthermore, the only major holdings shared by Justice Kennedy and the plurality were that the "fruit of the poisonous tree" analysis was inappropriate and that Seibert's statement should be suppressed. Therefore, it cannot be said that Justice Kennedy's subjective test was in fact the holding of the *Seibert* Court under a *Marks* analysis.

Justice Kennedy himself claimed that his opinion was "narrower," and many appellate courts have latched on to that assertion. *Seibert*, 542 U.S. at 622 (Kennedy, J., concurring); *see also United States v. Williams*, 435 F.3d 1148, 1157-58 (9th Cir. 2006) ("Although the plurality would consider all two-stage interrogations eligible for a *Seibert* inquiry, Justice Kennedy's opinion narrowed the *Seibert* exception to those cases involving deliberate use of the two-step procedure to weaken *Miranda*'s protections."); *United States v. Kiam*, 432 F.3d 524, 532-33 (3d Cir. 2006) (applying Justice Kennedy's test in finding that law enforcement officials had not performed a deliberate two-step interrogation), *cert. denied*, 546 U.S. 1223 (2006); *United States v. Mashburn*, 406 F.3d 303, 308-09 (4th Cir. 2005) ("In *Seibert*, Justice Kennedy

concurred in the judgment of the Court on the narrowest grounds."); *United States v. Briones*, 390 F.3d 610, 613 (8th Cir. 2004) ("Because Justice Kennedy relied on grounds narrower than those of the plurality, his opinion is of special significance."). But the bare assertion of being a narrower test does not make it so. Justice Kennedy's test might apply in fewer situations than the plurality's, but it is a substantively different test when it does apply. As demonstrated previously, Justice Kennedy's opinion cannot be a narrower slice of the plurality's opinion for the same reasons that a lemon wedge cannot be a narrower slice of an apple.

There is currently a split among the federal circuit courts concerning the proper interpretation of *Seibert*. As cited above, many courts have accepted Justice Kennedy's claim that his opinion is narrower and have therefore applied Justice Kennedy's test as the opinion of the court. But other courts have recognized that the holdings themselves are more complex than that. *See United States v. Stewart*, 388 F.3d 1079, 1090 (7th Cir. 2004) (reading the plurality's balancing test into Justice Kennedy's allowance for "curative steps"); *Carrizales-Toledo*, 454 F.3d at 1151 ("Determining the proper application of the *Marks* rule to *Seibert* is not easy, because arguably Justice Kennedy's proposed holding in his concurrence was rejected by a majority of the Court.").

None of the major holdings in the *Seibert* case were adopted by all nine of the Justices. More importantly, only three holdings received a majority of the

votes, as illustrated by the attached Venn diagram (App. 104). First, eight Justices agreed that the "fruit of the poisonous tree" approach was improper in the context of *Miranda*. *Seibert*, 542 U.S. at 619-622. Second, six Justices held that Seibert's second statement should be suppressed. *Id.*, 542 U.S. at 619-622. And third, seven Justices believed that the subjective intent of the interrogator was not a relevant factor in the analysis. *Id.*, 542 U.S. at 623 (O'Connor, J., dissenting) ("the plurality correctly declines to focus its analysis on the subjective intent of the interrogating officer."). The first majority holding is an important issue, but is not relevant to the present case. And the second majority holding is only relevant in a case that is factually identical to *Seibert*, which the present case is not. But the third majority holding was the focus of the lower court's analysis, and the lower court repudiated that holding on its way to reversing the conviction in this case.

The Texas Court of Criminal Appeals has not been alone in determining that Justice Kennedy's concurrence represented the opinion of the *Seibert* Court. As stated previously, the circuit courts and the state courts of last resort have disagreed on the issue. *Compare United States v. Pacheco-Lopez*, 531 F.3d 420, 427 n.11 (6th Cir. 2008), *and Kiam*, 432 F.3d at 532-33, *and United States v. Naranjo*, 426 F.3d 221, 231-32 (3d Cir. 2005), *and United States v. Aguilar*, 384 F.3d 520, 525 (8th Cir. 2004), *with Carrizales-Toledo*, 454 F.3d at 1151 (describing the problem with adopting Justice Kennedy's approach), *and United*

States v. Rodriguez-Preciado, 399 F.3d 1118, 1139-42 (9th Cir. 2005) (Berzon, J., dissenting) (describing how a court should not adopt Justice Kennedy's opinion and might instead choose to apply the plurality's test). Some courts have abandoned any hope of resolving the dispute and simply analyzed the issue under both the plurality's and Justice Kennedy's opinions, which is a waste of judicial resources. *See Tennessee v. Dailey*, 273 S.W.3d 94, 107 (Tenn. 2009) ("In this case, we again determine that it is unnecessary to predict the eventual outcome of the competing *Seibert* approaches because we find that the Defendant's postwarning confession is inadmissible under either the plurality's or Justice Kennedy's test."). Finally, the Supreme Court of Georgia recently held that the *Seibert* plurality was the controlling opinion because "a requirement that there be found a subjective intent on the part of police was not only rejected by the plurality of *Seibert*, but also by the four Justices who comprised the dissent." *Georgia v. Pye*, 653 S.E.2d 450, 453 n.6 (Ga. 2007). Therefore, it is appropriate for this Court to grant review on the first question presented. SUP. CT. R. 10(b) (indicating a reason for review when "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.").

B. Statements uttered during the course of a pre-warning polygraph examination are material to the analysis under *Missouri v. Seibert*.

With regard to the second question, the Texas Court of Criminal Appeals held that a *Miranda* violation occurs the instant that a "question-first interrogation begins." *Martinez*, 272 S.W.3d at 620. Therefore, the court concluded that it was "immaterial to our consideration whether incriminating statements emerged from the prewarning interrogation." *Id.*, 272 S.W.3d at 624. But the presence of prewarning incriminating statements was crucial to this Court in *Seibert*. In fact, three of the five factors listed by the plurality required knowledge of the prewarning statements: namely, "the completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, . . . and, the degree to which the interrogator's questions treated the second round as continuous with the first." *Seibert*, 542 U.S. at 615. And Justice Kennedy's concurrence stated that "If the deliberate two-step strategy has been used, postwarning statements that are *related to the substance* of prewarning statements must be excluded unless curative measures are taken before the postwarning statement is made." *Seibert*, 542 U.S. at 622 (J. Kennedy, concurring) (emphasis added). Therefore, the substance of the pre-warning statements was material under either the plurality's or Justice Kennedy's

test. And the Texas Court of Criminal Appeals was incorrect in their holding on that issue.

In *United States v. Patane*, 542 U.S. 630, 641 (2004), this Court stated, "Potential violations occur, if at all, only upon the admission of unwarned statements into evidence at trial." But the Texas Court of Criminal Appeals directly contradicted that holding when it stated, "When a question-first interrogation begins, it cannot be known whether the suspect will incriminate himself, but the suspect's rights as set out in *Miranda* have already been violated." *Martinez*, 272 S.W.3d at 624. That faulty premise was the basis for the Texas court to conclude that the nature of the pre-warning statements were immaterial to the analysis, which is also inconsistent with the majority of the opinions in *Seibert*. *Id.* The faulty premise led to a faulty conclusion that was inconsistent with nearly all of the *Seibert* opinions.

The Texas Court of Criminal Appeals has misstated and misapplied a rule of law in holding that the substance of any pre-warning statements is "immaterial." In fact, knowledge of such statements is critical to the analysis. *Cf. Agee v. White*, 809 F.2d 1487, 1491-92 (11th Cir. 1987) ("Here, by contrast, appellant's initial statement did not admit participation in criminal activity, and thus in no way increased the pressure for appellant to give the police additional, incriminating information."). Therefore, this Court should grant review in order to clarify and correct that rule. SUP. CT. R. 10(b).

C. A magistrate's issuance of *Miranda* warnings between a pre-warning polygraph examination at one location and a post-warning videotaped statement at another location operates as a sufficient break in continuity for the purposes of *Missouri v. Seibert*.

With regard to the third question, the Texas Court of Criminal Appeals held that the issuance of *Miranda* warnings by a magistrate at the courthouse while the respondent was transported from one location to another did not operate as a sufficient break in continuity for the purposes of *Seibert*. The Texas Court of Criminal Appeals listed the curative measures outlined by the plurality's and by Justice Kennedy's opinions in *Seibert*, but it did not apply them to the respondent's case. *Martinez*, 272 S.W.3d at 627. Instead, it merely concluded that the measures in the present case were not curative. And such amounted to an incorrect statement of the law.

The respondent had a brief general conversation with the officers prior to his post-warning statement; however, the discussion "didn't go into any details or anything," and the respondent claimed that he did not know anything about the case (RR. III – 19, 33-34). There was a delay of several hours between the arrest and the warnings; however, that delay was due to the administration of a polygraph exam. Furthermore, the polygraph examination and the videotaped statement occurred at different locations. Most importantly, the officers who conducted the videotaped

statement never referred to any pre-warning statements by the respondent in an attempt to compel the respondent to repeat them on the videotape (St. Ex. 1A). Finally, even in his videotaped statement, the respondent did not admit to participating in the shootings themselves; rather, he claimed that he remained in the back seat of the car while two other men involved in the murder got out (St. Ex. 1A).

There was a substantial break in the time and circumstances between the polygraph examination and the videotaped statement. After the polygraph examination, the respondent was taken before a magistrate at the courthouse where he received his warnings and was then taken to a third address where he eventually gave his statement. *See Seibert*, 542 U.S. at 622 (Kennedy, J., concurring) (stating that curative measures included "a substantial break in time and circumstances" between the two statements to allow the "accused to distinguish the two contexts and appreciate that the interrogation has taken a new turn."). To hold that such procedures do not operate as curative measures flies in the face of this Court's precedent in analogous situations, such as a confession given after an illegal arrest. *See Brown v. Illinois*, 422 U.S. 590, 611 (1975) ("I thus would require some demonstrably effective break in the chain of events leading from the illegal arrest to the statement, such as actual consultation with counsel or the accused's presentation before a magistrate for a determination of probable cause, before the taint can be deemed removed.") (Powell, J.,

concurring); *Johnson v. Louisiana*, 406 U.S. 356, 365 (1972) (holding that appearance before neutral magistrate and representation by counsel at lineup purged lineup of taint from illegal arrest).

If the Texas Court of Criminal Appeals had operated under the correct rule of law, it would have been compelled to find that a substantial break occurred in this case. And this Court's fractured *Seibert* opinion needs clarification in order to guide the lower courts on the correct rule of law in such situations. Therefore, this Court should grant review to eliminate the substantial confusion that has been generated in this area of the law and to settle on the proper analysis. *See* SUP. CT. R. 10(c) (indicating a reason for review when "a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court.").

CONCLUSION

For the forgoing reasons, the State of Texas requests that this Court grant review.

Respectfully submitted,

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Date: March 13, 2009

[SEAL]

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. PD-1917-06

RAUL ADAM MARTINEZ, JR., Appellant

v.

THE STATE OF TEXAS

ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW FROM THE THIRTEENTH COURT OF APPEALS HARRIS COUNTY

JOHNSON, J., delivered the opinion of the Court, in which PRICE, WOMACK, HOLCOMB, and COCHRAN, JJ., joined. PRICE, J., filed a concurring opinion. HERVEY, J., filed a dissenting opinion in which KELLER, P.J., and MEYERS and KEASLER, JJ., joined.

OPINION

Raul A. Martinez, Jr., appeals his conviction for capital murder.[1] Because the state chose not to seek

[1] TEX. PENAL CODE § 19.03(a)(2).

the death penalty, the jury's finding of guilt resulted in a sentence of life in prison. The Thirteenth Court of Appeals upheld his conviction.[2] *Martinez v. State,* 204 S.W.3d 914 (Tex. App. – Corpus Christi 2006). This Court granted appellant's petition for discretionary review: "Whether the court of appeals misapplied the standards of *Seibert* in determining that a proper and functional *Miranda* warning was given appellant here and finding appellant's custodial statement admissible." We reverse.

FACTS

In the early morning of August 2, 2003, Alfredo Balderas Loredo, Gustavo Camilo, and Manuel Arriaga Molina were socializing in the rear of an apartment complex in Houston when two men approached them with a rifle and a pistol. Two of the victims described the man carrying the rifle as a short, heavy, Hispanic male and the man carrying a pistol as a tall, skinny, Hispanic male. Mr. Balderas testified that the shorter man pressed the rifle into his abdomen and demanded money. Simultaneously, the taller man pointed the pistol at the other two victims and demanded money. Mr. Arriaga gave his wallet to the taller man, who responded by shooting Mr. Arriaga in the groin. Mr. Camilo also gave his

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[2] The First Court of Appeals initially received appellant's appeal, but transferred the case to the Thirteenth Court of Appeals.

wallet to the taller man, who responded by shooting Camilo in the stomach. The men pushed Mr. Balderas to the ground, took his wallet, shot him in the neck, and fled. Still alert, Mr. Balderas used his cell phone to call his brother-in-law, and his brother-in-law called the police. The three victims were taken to the hospital. Mr. Balderas was treated for his injuries and released that night. Mr. Camilo was hospitalized for a longer period of time and underwent multiple surgeries. Mr. Arriaga died a few hours after the incident.

Detectives Macario Sosa and Toby Hernandez of the Houston Police Department's homicide division investigated the case. There were no suspects until the officers were informed of a Crime Stoppers tip identifying appellant and James Ruiz as the primary suspects. Appellant matched the description of the short, heavy, Hispanic male, and Ruiz matched the description of the tall, skinny, Hispanic male. Mr. Balderas identified both appellant and Ruiz in a photo array. Mr. Camilo was able to identify only appellant. Officer Sosa secured a "pocket warrant"[3] for appellant's arrest.[4]

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[3] Officer Sosa testified that a "pocket warrant' is different from a regular arrest warrant in that it expires after 30 days, while a regular warrant expires when the suspect is arrested or the warrant is recalled.

[4] Officer Sosa did not obtain a pocket warrant for James Ruiz's arrest because, at the time of the identification, Ruiz was deceased.

On November 18, 2003, Officer Sosa arrested appellant in a convenience-store parking lot. Appellant was driving a late-model green Chevy Malibu.[5] At the time of his arrest, police did not give appellant *Miranda* warnings. At police headquarters, Officers Sosa and Hernandez questioned appellant about the robbery and murder. Appellant, however, denied knowing anything about the incident.

Shortly thereafter, Officers Sosa and Hernandez took appellant to a police polygrapher, who used the case file to develop the questions to be asked and then administered a polygraph test to appellant. This process took three to four hours to complete. The record does not reflect the name of the officer who administered the test, and when asked, Officer Sosa could not identify the officer.[6] Likewise, the questions that were asked during the polygraph examination are not in the record.

After the test, Officers Sosa and Hernandez again took custody of appellant, and Officer Sosa informed appellant that he had failed the polygraph exam.[7] Officer Sosa conceded that it is not customary for a suspect to be informed that he "failed" a test;

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[5] Appellant conceded that his Malibu had been used in the robbery.

[6] Officer Sosa could not recall the polygrapher's name, but stated that it was a male officer.

[7] Officer Sosa testified that he did not know this to be factually true, but that it had been communicated to him by the polygrapher.

suspects are usually informed that "deception was indicated on some of the test questions." The record is silent as to which questions the polygrapher determined that appellant had answered deceptively. Officers then took appellant to municipal court, where a magistrate gave appellant *Miranda* and other statutory warnings for the first time.

Upon appellant's prompt return to the central holding station, Officers Sosa and Hernandez again questioned appellant about the robbery and murder. Officer Sosa repeated the *Miranda* warnings, and appellant gave a videotaped statement regarding the incident.[8] At the beginning of the video, appellant stated that he had become aware of certain facts about the crime through the polygraph examiner. Although before the polygraph appellant asserted that he was not aware of the robbery and murder, on the videotape appellant discussed pertinent information regarding the crime. Appellant further stated that he was not one of the assailants who had robbed and shot the victims, but rather was a "lookout" person. He maintained that he had remained in the backseat of his Chevy Malibu throughout the incident. Appellant had initially stated that there were only three persons involved, but after Officer Sosa informed him of conflicting information, he then stated that there were four persons involved in the

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[8] The videotape was marked as state's exhibit 1. Portions of the interview are missing because the videotape was stopped at various points, and some portions were redacted from the record.

incident. Appellant also asserted that the individual who was actually carrying the rifle resembled appellant and that they could easily have been mistaken for each other.

The state indicted appellant for capital murder. Before trial, appellant filed a motion to suppress his statement and requested a hearing. At the hearing on that motion, appellant sought to suppress the videotaped statement because he had not received *Miranda* warnings when he was arrested or before the polygraph examination. Officer Sosa was the state's sole witness at the hearing. The trial court found Officer Sosa to be a credible witness, concluded that appellant had voluntarily and knowingly waived his right to remain silent, and admitted the videotaped statement.

On appeal, appellant's sole issue was that the "failure to *Mirandize* appellant before the initial interrogation and the polygraph examination led to constitutional error in the admission of his videotaped statement at trial." *Martinez,* 204 S.W.3d at 914. The court of appeals affirmed appellant's conviction, finding that appellant did not satisfy the five factors set out in *Missouri v. Seibert,* 542 U.S. 600 (2004). It further stated that the admission of the videotaped statement did not constitute constitutional error because it was made after a proper and functional *Miranda* warning. *Id.* at 922.

In his petition to this Court, appellant's sole claim is that the court of appeals misapplied the

standards of *Seibert* when it considered whether a proper and functional *Miranda* warning was given.

SEIBERT

Patricia Seibert was charged with murder. After her arrest, she gave a confession about the murder without being given *Miranda* warnings.[9] *Seibert,* 542 U.S. at 600.[10] The detective returned 20 minutes later, gave *Miranda* warnings, and obtained a signed waiver and a second confession. Before trial, Seibert sought to exclude both the unwarned and warned statements. The Missouri trial court excluded only

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[9] "A officer from [the Rolla] police department testified that the strategy of withholding *Miranda* warnings until after interrogating and drawing out a confession was promoted not only by his own department, but by a national police training organization and other departments in which he had worked." *Seibert* at 609.

[10] In *Miranda v. Arizona,* the United States Supreme Court addressed "interrogation practices . . . likely . . . to disable [an individual] from making a free and rational choice" about speaking. *Miranda v. Arizona,* 384 U.S. 436, 445 (1966). The Court unequivocally ruled that an accused, held in custody, must be given the adequate and effective warnings "prior to questioning," not merely before signing a written statement after all the custodial interrogation is complete. *Id.* at 445. The failure to give timely warnings generally results in the state being required to forfeit the use of any statement obtained during that interrogation during its case-in-chief. *Id.* When a defendant alleges that the *Miranda* protections were thwarted, the burden of showing admissibility rests on the prosecution. *Seibert,* 542 U.S. at 609 (quoting *Brown v. Illinois,* 422 U.S. 590, 604 (1975)).

the unwarned statement, and the defendant was convicted of second-degree murder. The Missouri Supreme Court, however, reversed the defendant's conviction, stating that the interrogation was continuous and that the second statement was the product of the invalid first statement. The United States Supreme Court granted *certiorari.* A four-justice plurality also ruled that Seibert's warned statements were inadmissible. *Seibert,* 542 U.S. at 616. The Court stated that

> when a confession so obtained is offered and challenged, attention must be paid to the conflicting objects of *Miranda* and the question-first strategy. *Miranda* addressed "interrogation practices . . . likely . . . to disable [an individual] from making a free and rational choice" about speaking, 384 U.S. at 464-465, and held that a suspect must be "adequately and effectively" advised of the choice the Constitution guarantees. *Id.* at 467. Question-first's object, however, is to render *Miranda* warnings ineffective by waiting to give them until after the suspect has already confessed. . . . By any objective measure, it is likely that warnings withheld until after interrogation and confession will be ineffective in preparing a suspect for successive interrogation, close in time and similar in content. The manifest purpose of question-first is to get a confession the suspect would not make if he understood his rights at the outset. When the warnings are inserted

> in the midst of coordinated and continuing interrogation, they are likely to mislead and "deprive a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them." *Moran v. Burbine,* 475 U.S. 412, 424 (1986).

Id. at 601. The plurality further emphasized that

> the threshold issue when interrogators question first and warn later is thus whether it would be reasonable to find that in these circumstances the warnings could function "effectively" as *Miranda* requires. Could the warnings effectively advise the suspect that he had a real choice about giving an admissible statement at that juncture? Could they reasonably convey that he could choose to stop talking even if he had talked earlier? For unless the warnings could place a suspect who has just been interrogated in a position to make such an informed choice, there is no practical justification for accepting the formal warnings as compliance with *Miranda,* or for treating the second stage of interrogation as distinct from the first, unwarned and inadmissible segment.

Id. at 611-12.

The plurality crafted a multi-factor test for determining "whether *Miranda* warnings delivered midstream" could be effective.

> The contrast between *Elstad* and this case reveals a series of relevant facts that bear on

> whether *Miranda* warnings delivered midstream could be effective enough to accomplish their object: the completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and the second, the continuity of police personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first.

Id. at 615-16.

Although agreeing "with much in the careful and convincing opinion for the plurality," Justice Kennedy's concurring opinion took a narrower view – *Oregon v. Elstad,* 470 U.S. 298 (1985), should be followed unless there is proof that the interrogating officer knowingly and willing utilized the two-stage technique, thus undermining *Miranda* warnings. Justice Kennedy's focus was on "whether admission of the evidence under the circumstances would frustrate *Miranda*'s central concerns and objectives." *Seibert* at 619 (Kennedy, J., concurring). He stated that

> [t]he plurality concludes that whenever a two-stage interview occurs, admissibility of the postwarning statement should depend on "whether [the] *Miranda* warnings delivered midstream could have been effective enough to accomplish their object" given the specific facts of the case. This test envisions an objective inquiry from the perspective of the suspect, and applies in the case of both

intentional and unintentional two-stage interrogations. . . . In my view, [the plurality's] test cuts too broadly. . . . I would apply a narrower test applicable only in the infrequent case, such as we have here, in which the two-step interrogation technique was used in a calculated way to undermine the *Miranda* warning. . . . *Miranda's* clarity is one of its strengths, and a multifactor test that applies to every two-stage interrogation may serve to undermine that clarity. *Cf. Berkemer v. McCarty,* 468 U.S. 420, 430 (1984).

The admissibility of postwarning statements should continue to be governed by the principles of *Elstad* unless the deliberate two-step strategy was employed. If the deliberate two-step strategy has been used, postwarning statements that are related to the substance of prewarning statements must be excluded unless curative measures are taken before the postwarning statement is made. Curative measures should be designed to ensure that a reasonable person in the suspect's situation would understand the import and effect of the *Miranda* warning and of the *Miranda* waiver. For example, a substantial break in time and circumstances between the prewarning statement and the *Miranda* warning may suffice in most circumstances, as it allows the accused to distinguish the two contexts and appreciate that the interrogation has taken a new turn. *Cf. Westover v. United States,* decided with *Miranda v. Arizona,* 384 U.S. 436 . . . (1966). Alternatively, an additional warning that explains the

> likely inadmissibility of the prewarning custodial statement may be sufficient. No curative steps were taken in this case, however, so the postwarning statements are inadmissible and the conviction cannot stand.

Seibert at 621-22 (Kennedy, J., concurring). We find Justice Kennedy's reasoning persuasive.

ELSTAD

Before *Seibert, Elstad* controlled when addressing *Miranda* warning violations and the corresponding confessions. In *Elstad,* a suspect spoke a single incriminating sentence at his home.[11] *Elstad,* 470 U.S. at 301. Elstad had not received *a Miranda* warning before making the statement, apparently because the police officers did not believe that Elstad was in custody at the time of his statement. *Id.* Elstad was taken to the police station, where he received a proper warning, waived his *Miranda* rights, and made a second statement. *Id.* He later argued that the second statement should be suppressed because it stemmed from the unwarned first statement. *Id.* at 302. The Supreme Court held that, although *a Miranda* violation made the pre-*Miranda*-warning

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[11] The officer sat down with Elstad and asked him if he knew a person by the name of Gross, and he said that he did and added that he had heard that there was a robbery at the Gross house. At that point, the officer told Elstad that he felt that Elstad was involved in the robbery. Elstad looked at him and stated, "Yes, I was there."

statement inadmissible, the warned statements could be introduced against the accused because, given the facts of the case, "neither the general goal of deterring improper police conduct nor the Fifth Amendment goal of assuring trustworthy evidence would be served by suppression." *Id.* at 308 (citing *Michigan v. Tucker,* 417 U.S. 433, 445 (1974)).

ANALYSIS

This Court has not recently directly addressed midstream *Miranda* warnings such as those given in this case, but before *Seibert,* in *Jones v. State,* 119 S.W.3d 766 (Tex. Crim. App. 2003), we addressed facts similar to those presented here. Before receiving *Miranda* warnings, Jones orally admitted his involvement in two murders. *Id.* at 771-72. An officer wrote down the defendant's confession "verbatim" on a statement form. *Id.* After the first confession, the officer read the defendant the *Miranda* warnings that appeared at the top of the written form. *Id.* The officer and defendant read the statement simultaneously, then the defendant corrected mistakes, initialed revisions, and signed the statement at the bottom. *Id.* We declined to apply *Elstad,* stating that,

> in contrast to *Elstad,* where the initial unwarned statement took place at the defendant's home and the warned statement was given after transporting the defendant to the police station, the unwarned and warned statements in this case were given during a nearly undifferentiated single event, taking

> place in the same room as an uninterrupted and continuous process. The written statement [taken by Texas Ranger Akin] was literally a transcription of appellant's unwarned oral statement after he finally received his *Miranda* warnings; he simply signed the written statement that he had dictated to [the police officer] before he was warned. To apply *Elstad* here and declare the [second] statement admissible by virtue of the late admonishment of the required warnings would undermine the spirit and intent of *Miranda*. The waiver of rights given in connection with the [second] statement was not constitutionally valid in light of the circumstances and entire course of police conduct.

Jones, 119 S.W.3d at 775. The *Jones* Court held that the second statement was inadmissible, but found that the error in admitting it was harmless beyond a reasonable doubt.

Here, the pertinent facts are undisputed: (1) appellant was in custody and under arrest for capital murder; (2) Officer Sosa did not give appellant *Miranda* warnings at the time of his arrest; (3) Officers Sosa and Hernandez questioned appellant about the crime at the police station without giving the required warnings;[12] (4) appellant did not receive

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[12] During cross-examination at the hearing on appellant's motion to suppress, Officer Sosa twice conceded that he failed to give appellant his proper warnings.

(Continued on following page)

Miranda warnings before being taken for a polygraph examination;[13] (4) the identity of the polygrapher and the polygraph-examination questions are not included in the trial or appellate record;[14] and (6) a magistrate read the *Miranda* warnings to appellant only after both the first round of interrogation and the polygraph examination. Based on these facts, we have determined that "the two-step interrogation technique was used in a calculated way to undermine

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> [Defense]: When you got down to [the police station,] what's the first thing you do?
>
> [Officer Sosa]: We got to the [police station], I gathered the case file information together so I'd have it at my disposal. I advised him of why he was arrested again and I asked him if he thought that he might want to speak with us. . . .
>
> [Defense]: Had you read [appellant] his rights at that time?
>
> [Officer Sosa]: Had I read him – I hadn't read him his rights at that time, no.
>
> * * *
>
> [Defense]: Up until the time [you all] were going to the magistrate, you had not advised [appellant] that he had any of the rights that you later gave him on the videotape?
>
> [Officer Sosa]: I did not read him his rights, formally, no.

[13] There is no testimony in the record that appellant was told at any time that he could refuse to take the polygraph examination.

[14] In the motion for new trial, appellant's counsel alleged that the state obtained the name of the polygrapher by calling the police department, but withheld this information until after trial began.

the *Miranda* warning. . . ." *Seibert* at 621 (Kennedy, J., concurring).

The parties assert contrary positions as to the completeness and detail of the questions and answers in the first round of interrogation. Appellant contends that the court of appeals misapplied the *Seibert* factors by failing to place the burden of proof on the state to satisfy the five factors, including the questions from the first interrogation, and that it was the state's burden to show what questions were used during the polygraph examination.

The state contends that appellant has the burden of producing an adequate record and that he has failed to develop the record concerning what specific questions were asked during the polygraph examination and any of the unwarned conversations. *See Ortiz v. State,* 144 S.W.3d 225 (Tex. App. – Houston [14th Dist.] 2004, pet. ref'd) (stating that repeal of former rule (Rule 50(d)) of appellate procedure does not absolve appellant of his burden of presenting a record to show error requiring reversal insofar as he is required to develop record to show nature and source of an error).

The court of appeals took the same position, asserting that appellant did not submit an adequate record regarding the unwarned statements and questions asked during the polygraph examination. It stated that

> at the outset, we note that there is no record of Martinez's pre-warning statements made

> to Officers Sosa and Hernandez or the polygraph examiner. The first two factors that the *Seibert* plurality found relevant in determining whether *Miranda* warnings delivered midstream are effective are the completeness and detail of the questions and answers in the first round of interrogation and the overlapping content of the two statements. The dissent is troubled by Martinez's two references to the polygrapher telling him that three people were shot during the incident. Unlike *Seibert,* Martinez was repeating the polygrapher's general statements regarding the crime, not his own unwarned statements. Therefore, the first two *Seibert* factors are not applicable in Martinez's case.

Martinez, 204 S.W.3d at 921. Indeed, the record is lacking; it does not contain a complete, or even partial, description of the questions and answers in the first round of interrogation and polygraph test. Even so, this does not preclude analysis.

The state, as the proponent of the evidence of appellant's confession, bears the burden of establishing its admissibility. TEX. RULES EVID. 104(a). *See also De la Paz v. State,* ___ S.W.3d ___, 2008 Tex. Crim. App. LEXIS 751, at *26-27 (Tex. Crim. App. 2008); *Cofield v. State,* 891 S.W.2d 952, 954 (Tex. Crim. App. 1994). Further, we have long held that the prosecution bears the burden of proving admissibility when *a Miranda* violation is found. *See, e.g., Creager v. State,* 952 S.W.2d 852, 860 (Tex. Crim. App. 1997); *Alvarado*

v. State, 912 S.W.2d 199, 211 (Tex. Crim. App. 1995) (quoting *Colorado v. Connelly,* 479 U.S. 157 (1986)). When the officers initially questioned appellant at the police station without giving him *Miranda* warnings, they violated appellant's constitutional rights. At the suppression hearing, the state failed to provide the polygrapher's name, the questions used during the polygraph examination, or the content of the initial interrogation of appellant, all of which are under the exclusive control of the state.

The state also asserts that this case is distinguishable from *Seibert* because there is no evidence that appellant made any incriminating statements before he was given his *Miranda* warnings. We agree with Justice Kennedy (and the plurality in *Seibert)* that "not every violation of [*Miranda*] requires suppression of the evidence obtained. Evidence is admissible when the central concerns of *Miranda* are not likely to be implicated and when other objectives of the criminal justice system are best served by its introduction." *Seibert* at 618-19 (Kennedy, J., concurring). In some cases, an officer might not recognize that a suspect is in custody and that warnings are therefore required. We also agree that the suppression of warned statements under such a circumstance would serve "neither the general goal of deterring improper police conduct nor the Fifth Amendment goal of assuring trustworthy evidence." *Elstad,* 470 U.S. at 308. Indeed, *Elstad* provides a practical approach to enforcing *Miranda* protections. "[A] suspect who has once responded to unwarned yet

uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite *Miranda* warnings." *Id.* at 318. Contrary to *Elstad,* however, *a Miranda* warning given midstream, as in this case, requires a closer examination of the investigatory techniques used before and after *Miranda* warnings are given.

When a question-first interrogation begins, it cannot be known whether the suspect will incriminate himself, but the suspect's rights as set out in *Miranda* have already been violated. Although both *Elstad and Seibert* involved incriminating statements in the first interrogation that were repeated in the second, that was not the focus of the holdings. In both cases, the prime concern was the constitutional rights that the *Miranda* decision was intended to protect. *Seibert* at 611, 619, 621 (whether warnings could function effectively, as *Miranda* requires (plurality); "whether admission of the evidence under the circumstances would frustrate *Miranda*'s central concern and objectives"; whether the two-step interrogation technique was used in a calculated way to undermine the *Miranda* warning (Kennedy, J., concurring)). It is immaterial to our consideration whether incriminating statements emerged from the unwarned interrogation.

Here, appellant was in custody for the purposes of *Miranda;* he gave both statements to law-enforcement officials after his formal arrest pursuant

to an arrest warrant, and both statements were given at a police station.[15] This indicates that the absence *of Miranda* warnings at the beginning of the interrogation process was not a mistake based on the interrogating officers' mistaken belief that appellant was not in custody, but rather a conscious choice.[16]

The state challenges the court of appeals's finding of continuity of police personnel, arguing that there was a "substantial break" between the two statements; and that, therefore, the interrogation was not continuous. The record does not support this argument.[17]

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[15] Officer Sosa testified that the first interrogation took place at 1200 Travis and the second investigation took place at 61 Reisner, the central holding area.

[16] *The Seibert* plurality articulated that intent is not the dispositive factor in determining whether an officer used the question-first strategy "because the intent of the officer will rarely be as candidly admitted as it was here (even as it is likely to determine the conduct of the interrogation); the focus is on facts apart from intent that show the question-first tactic at work." *Seibert* at 616.

[17] The *Seibert* plurality stated that "it would ordinarily be unrealistic to treat two spates of integrated and proximately conducted questioning as independent interrogations subject to independent evaluation simply because *Miranda* warnings formally punctuate them in the middle." *Seibert* at 614. "As Justice Souter points out, the two-step technique permits the accused to conclude that the right not to respond did not exist when the earlier incriminating statements were made. The strategy is based on the assumption that *Miranda* warnings will tend to mean less when recited mid-interrogation, after inculpatory statements

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The interrogation process was lengthy. Officer Sosa testified that he arrested appellant midmorning and that he and Officer Hernandez first questioned appellant regarding the case around 10:00 a.m. Shortly after the first interrogation ended, appellant was taken to the polygrapher and given a polygraph examination, which took three to four hours. Immediately following the polygraph examination, appellant was taken to the municipal court, where a magistrate administered *Miranda* warnings at approximately 5:00 p.m., seven hours after the first questioning. After being arraigned, appellant was returned to the central holding station and gave his videotaped, warned, second statement at approximately 5:15 p.m.[18]

Determining whether a suspect was in the continuous presence of police personnel cannot be accomplished by focusing on only the lapse of time between the two statements; it is determined by considering all of the events that occurred between the unwarned statement and warned statement. Throughout the day of his arrest on this charge, appellant was with police officers or other police department personnel or detained in a police facility.

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have already been obtained." Seibert at 620 (Kennedy, J., concurring).

[18] Officer Sosa also testified that they fed appellant at some point during the day, and that appellant was allowed to call his father and girlfriend, but Officer Sosa could not give a specific time.

The same officers conducted the first and second periods of questioning, and aside from the time during which the polygraph test was administered by another police officer, they were both continuously with appellant. From arrest to questioning to polygraph to magistration to questioning, the presence of police personnel was uninterrupted. We discern no "substantial break in time and circumstances between the prewarning statement and the *Miranda* warning."

Appellant asserts that the court of appeals erred in failing to consider that Officers Sosa and Hernandez did not tell him that all of the prior questioning was improper and that it could not be used against him. The state argues that appellant was properly warned of his rights and waived them before giving his videotaped statement.

It is evident that the officers treated the videotaped interrogation as a continuation of the first; as in *Siebert,* at the beginning of the second interrogation, Officer Sosa referred to the first interrogation and restated what he had told appellant during the first interview.[19] While the questions and answers from the first round of interrogation are not in the record, we can conclude from Officer Sosa's reference to

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[19] [Officer Sosa]: Remember, I told you that I'm not going to yank your chain; [that] I'm not going to bull [s]h** around?

[Appellant]: Yeah.

the first interrogation that appellant could reasonably assume that a continuity existed between the two interrogations.

On the video, Officer Sosa began by reading the *Miranda* warnings to appellant. He then asked appellant if he understood his rights, and appellant replied affirmatively. Both officers, however, failed to inform appellant that, based on the lack of *Miranda* warnings, any prior statement made during a previous interrogation, including the polygraph exam, could be not used against him.

The polygraph test, in and of itself, poses great concern. Before taking the polygraph, appellant denied knowing about the crime. Officer Sosa failed to inform appellant that he could refuse to take the polygraph test or that, after starting the test, he could stop at any time. *See generally* TEX. CODE CRIM. PROC. art. 15.051. At the conclusion of the test, Officer Sosa informed appellant that he had "failed" the test without indicating that the results showed deception as to some answers, nor did he tell appellant which questions appellant had answered deceptively. As previously noted, the polygraph examiner, and the facts learned by appellant from the polygraph examiner, were mentioned by appellant and the officers in the video. It has long been the rule in this state that references to a polygraph test, or to its results, are inadmissible for all purposes. *See Nesbit v. State* 227 S.W.3d 64, 66 (Tex. Crim. App. 2007) (quoting *Nethery v. State,* 692 S.W.2d 686, 700 (Tex. Crim. App. 1985)). Hence, the officers had the responsibility to inform

appellant that the questions asked during polygraph test, or the test results, could not be used at trial and that any mention of the test at trial was likewise prohibited. This, coupled with the fact that the officers initiated the conversation regarding the first interrogation, likely created the belief in appellant's mind that he was compelled to again discuss the matters raised in the first interview during the second interview.[20]

If the deliberate two-step strategy has been used, "postwarning statements that are related to the

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[20] The *Seibert* plurality emphasized that

> [i]t seems highly unlikely that a suspect could retain any such understanding when the interrogator leads him a second time through a line of questioning the suspect has already answered fully. The point is not that a later unknowing or involuntary confession cancels out an earlier, adequate warning; the point is that the warning is unlikely to be effective in the question-first sequence we have described.

Seibert at 614 n.5.

Justice Kennedy noted that

> [t]he technique used in this case distorts the meaning of *Miranda* and furthers no legitimate countervailing interest. The *Miranda* rule would be frustrated were we to allow police to undermine its meaning and effect. The technique simply creates too high a risk that postwarning statements will be obtained when a suspect was deprived of "knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them." *Moran v. Burbine*, 475, U.S. 412, 423-24 . . . (1986).

Seibert at 621 (Kennedy, J., concurring).

substance of prewarning statements must be excluded unless curative measures are taken before the postwarning statement is made." *Seibert* at 619 (Kennedy, J., concurring). We agree that "curative measures should be designed to ensure that a reasonable person in the suspect's situation would understand the import and effect of the *Miranda* warning and of the *Miranda* waiver." *Id.* Examples of appropriate curative measures include: (1) a substantial break in time and circumstances between the unwarned statement and the *Miranda* warning (Kennedy);[21] (2) explaining to the defendant that the unwarned statements, taken while in custody, are likely inadmissible (Kennedy); (3) informing the suspect that, although he previously gave incriminating information, he is not obligated to repeat it (plurality); (4) the interrogating officers refrain from referring to the unwarned statement unless the defendant refers to it first (plurality); or (5) if the defendant does refer to the *pre-Miranda* statement, the interrogating officer states that the defendant is not obligated to discuss the content of the first statement

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[21] The state's assertion must also fail because the polygraph test, which was not completed until approximately 4:30 p.m., was an integral part of the unwarned statement. Less than an hour after the polygraph test ended, police began the second interrogation process, thereby leaving an insubstantial break between the two interrogations.

(plurality).[22] No curative steps were taken in this case.

The officers had the responsibility of applying curative measures at the beginning of the second interview, or, at the very least, when they referred to the first interrogation of appellant. They did neither. Such omissions or actions are not likely "to ensure that a reasonable person in the suspect's situation would understand the import and effect of the *Miranda* warning and of the *Miranda* waiver." *Seibert* at 622 (Kennedy, J., concurring). Curative measures allow the accused "to distinguish the two contexts and appreciate that the interrogation has taken a new turn." *Id.*

In this case, the officers did not apprise appellant of his *Miranda* rights when they began custodial interrogation and failed to apply any curative measures in order to ameliorate the harm caused by the *Miranda* violation. Appellant's videotaped statement was therefore inadmissible. We reverse the judgment of the court of appeals and remand this cause to the court of appeals so that it may conduct a harm analysis.

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[22] These examples are nonexclusive, but they provide guidance as to when curative measures are needed.

PRICE, J., filed a concurring opinion.

CONCURRING OPINION

This case was tried over a year before the Supreme Court issued its opinion in *Missouri v. Seibert*.[1] The appellant's brief in the court of appeals was filed a week before *Seibert*.[2] The court of appeals's resolution of the appellant's only claim on appeal was thus hampered by a record that was developed *in anticipation* of a Supreme Court opinion, rather than in light of already-established Supreme Court precedent. There is no claim that the issue was not properly preserved for appeal, however, and *Seibert* would apply retroactively to any case pending on direct appeal, as this one was.[3] Once a defendant has shown that his statement was made as a result of custodial interrogation,[4] the State has the burden to establish

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[1] 542 U.S. 600 (2004).

[2] *See Martinez v. State*, 204 S.W.3d 914, 924 n.19 (Tex. App. – Corpus Christi 2006) (Yanez, J., dissenting).

[3] *Griffith v. Kentucky*, 479 U.S. 314 (1987).

[4] *See Herrera v. State*, 241 S.W.3d 520, 526 (Tex. Crim. App. 2007) (State has no burden to show *Miranda* compliance unless record "clearly establishes" defendant's statement was product of custodial interrogation). Here, it is undisputed that the appellant was under arrest from the outset of his interaction with the police, and any inquiry of the appellant about the offense by the police after that, including during the polygraph examination, unquestionably constituted interrogation.

compliance with *Miranda*.[5] I do not know whether that burden should extend to disproving circumstances that precede the *Miranda* warnings that might suffice, in contemplation of *Seibert,* to call the efficacy of those warnings into doubt. I am, therefore, not entirely unsympathetic with Judge Hervey's view of matters. However, the State itself has never complained that it has been saddled with an inappropriate burden of proof in this case. In any event, even were we to hold that the burden more appropriately falls upon the appellant to prove circumstances that would impugn the efficacy of otherwise valid *Miranda* warnings, I believe that on the record before us it can be said that he has carried that burden, if only barely.

The debate in the court of appeals centered around which of the opinions in *Seibert* was the controlling one, the plurality opinion of Justice Souter or the narrower concurring opinion of Justice Kennedy. Applying the Souter plurality as authoritative, the majority of the court of appeals held that the appellant had failed to show that the pre-*Miranda* contact with the police, including the polygraph, undermined the effectiveness of the *Miranda* warnings.[6] Applying the Kennedy concurrence, which she

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[5] *See Miranda v. Arizona*, 384 U.S. 436, 478 (1966) (statements made during custodial interrogation are inadmissible "unless and until [*Miranda*] warnings and waivers are demonstrated by the prosecution at trial[.]); *Colorado v. Connelly*, 479 U.S. 157, 167-68 (1986) (State has burden to show waiver of *Miranda* rights).

[6] *Martinez v. State*, *supra*, at 918-921.

deemed controlling, the dissenting justice would have held that the police deliberately failed to *Mirandize* the appellant before subjecting him to the polygraph examination, and took no curative measures to assure the efficacy of the subsequent warnings.[7] Without expressly resolving (or even addressing) this dispute in the lower court, the Court today simply declares Justice Kennedy's view of the law "persuasive," and seems to adopt it. I agree that we do not need to reach the issue of which opinion is controlling, since, in my view, the appellant should prevail under either test.

As both Judge Hervey and the court of appeals point out, we know almost nothing on the present record about the substance of the initial interrogation or the polygraph examination. Assuming for the sake of argument that the burden rests with the defendant, ordinarily this gap in the record would prove fatal to a *Seibert* claim, which on its face is predicated upon the fact that the police obtained a presumptively coerced *confession* before *Mirandizing* the suspect. Here, what little the record does reveal about the appellant's pre-*Miranda* contact with police is that he steadfastly denied any involvement in the offense until after he was warned. But the record also shows that, after he submitted to the polygraph examination, the appellant was immediately informed that he had failed it. We do not know specifically in what respect his answers may have been

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[7] *Id.* at 924-28.

deceptive, but we can be sure that the police told him they knew of his deception in an effort to wear down his resistance to confessing to them, by demonstrating to him that they already "had the goods" on him.[8] To me, this is the determinative circumstance in this case. It satisfies both the Souter and the Kennedy criteria for establishing an ineffective mid-interrogation *Miranda* warning.

In explaining why warnings given after a confession has already been elicited may not serve as the constitutionally adequate prophylaxis that *Miranda* envisioned, Justice Souter observed:

> After all, the reason that question-first is catching on is as obvious as its manifest purpose, which is to get a confession the suspect would not make if he understood his rights at the outset; the sensible underlying assumption is that with one confession in hand before the warnings, the interrogator can count on getting its duplicate, with trifling additional trouble. Upon hearing the warnings only in the aftermath of interrogation and just after making a confession, a suspect

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[8] Judge Hervey complains that the record does not indicate whether the appellant was *Mirandized* at the outset of the polygraph examination. Dissenting opinion, at 10 n.18. It is undisputed that the appellant was under arrest when he submitted to the polygraph examination, the quintessence of police interrogation. The State therefore had the burden to prove he had been *Mirandized* at this juncture. *See* n.5, *ante*. A silent record on this point must militate against the State.

> would hardly think he had a genuine right to remain silent, let alone persist in so believing once the police began to lead him over the same ground again. A more likely reaction on a suspect's part would be perplexity about the reason for discussing rights at that point, bewilderment being an unpromising frame of mind for knowledgeable decision. What is worse, telling a suspect that "anything you say can and will be used against you," without expressly excepting the statement just given, could lead to an entirely reasonable inference that what he has just said will be used, with subsequent silence being of no avail.[9]

The same "sensible underlying assumption" pertains to the interrogator's use of a failed polygraph. A suspect who has been interrogated and confronted with the fact that his denials did not pass a lie-detector test would not likely appreciate his right to remain silent, even once *Miranda* warnings are administered, when the police begin to "lead him over the same ground" with respect to which his mendacity has already been revealed. This is especially so if the tardy *Miranda* warnings cause him reasonably to believe that evidence of his mendacity on the polygraph examination *can and will* be used against him. A failed polygraph is practically as effective as a coerced confession in so demoralizing a suspect that subsequent *Miranda* warnings will lack

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[9] *Seibert*, *supra*, at 613.

their intended efficacy. I agree with the Court that, given the continuity of the appellant's interrogation and his interrogators,[10] "a reasonable person in [his] shoes would not have understood [mid-stream *Miranda* warnings] to convey a message that [he] retained a choice about continuing to talk."[11]

Justice Kennedy would require that the use of the question-first tactic was a deliberate choice of the police interrogators. The police waited more than six hours after questioning had begun to take the appellant to the magistrate to have him *Mirandized*. But they had him *Mirandized* immediately after informing him that he had failed the polygraph. It is fair to infer from these circumstances that the whole day's interrogation up to that point had been aimed *either* at eliciting a pre-*Miranda* confession that they could then have him repeat, or at demoralizing him to the point that a post-warning confession would be forthcoming. Indeed, it is hard to imagine what else could explain the lengthy delay in *Mirandizing* him after he was plainly under arrest and the police obviously desired to, and did in fact, question him about the offense. The Court is justified in its *de novo* conclusion that the police utilized a deliberate tactic, calculated to undermine the appellant's will to resist

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[10] Majority opinion, at 15-16.

[11] *Seibert*, *supra*, at 617.

talking before *Miranda* warnings could steel his resolve.[12]

Both Justice Souter and Justice Kennedy would look to see whether some curative measures may have been taken.[13] I agree with the Court that there was no meaningful break in the time or circumstances of the day-long interrogation sequence such that the demoralizing effects of the appellant's learning he had failed the polygraph examination would have worn off. Nor was the appellant informed as

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[12] There is no dispute about the historical facts. Neither is there any application of law to fact that turns on the demeanor or credibility of Officer Sosa, the only witness at the suppression hearing. Although the facts were not as well developed as could be hoped for, the facts that *were* elicited were essentially unchallenged. Thus, the reviewing courts may review the question of the efficacy of the mid-stream *Miranda* warning *de novo*. *State v. Ross*, 32 S.W.3d 853, 856 (Tex. Crim. App. 2000).

[13] *See Seibert, supra*, at 616 (plurality opinion) (Seibert's interrogating officer, in administering *Miranda* warnings, "said nothing to counter the probable misimpression that the advice that anything Seibert said could be used against her also applied to the details of the inculpatory statement previously elicited. In particular, the police did not advise that her prior statement could not be used."); *id.* at 622 (Kennedy, J., concurring) ("For example, a substantial break in time and circumstances between the pre-warning statement and the *Miranda* warning may suffice in most circumstances, as it allows the accused to distinguish the two contexts and appreciate that the interrogation has taken a new turn. * * * Alternatively, an additional warning that explains the likely inadmissibility of the pre-warning custodial statement may be sufficient.")

part of the *Miranda* warning he eventually received that failing the polygraph examination was not a circumstance that could be used against him at his trial (both because it came prior to any *Miranda* warnings and because the results of polygraph examinations are deemed generally too unreliable to be admissible in criminal trials in Texas). Because no such ameliorating circumstances exist, I conclude, like the Court,[1] that the *Miranda* warnings "could [not] have served their purpose,"[2] and that the appellant's confession therefore should have been suppressed.

With these additional observations, I join the Court's opinion.

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HERVEY, J., filed a dissenting opinion in which KELLER, P.J., MEYERS and KEASLER JJ., joined.

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[1] Majority opinion, at 15-20.

[2] *Seibert*, *supra*, at 617.

DISSENTING OPINION

The federal constitutional decision in *Miranda v. Arizona*[3] establishes the prophylactic rule that an in-custody suspect must be "warned" that he has certain rights, such as the right to remain silent, before the police can question the suspect. In this case, appellant basically claims that, even though he received these warnings before he voluntarily made a custodial videotaped statement to the police, these warnings nevertheless failed to "adequately and effectively" apprise him of his rights under *Miranda*.

The majority opinion appears to decide that Justice Kennedy's one-judge concurring opinion in *Missouri v. Seibert*[4] contains the Court's holding in that case. *See Marks v. United States,* 430 U.S. 188, 193 (1977) (where "a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds") (internal quotes omitted).[5] The majority opinion also appears to decide that appellant wins under the "holding" in Justice Kennedy's concurring opinion in *Seibert,* because the incomplete record that

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[3] 384 U.S. 436, 478-79 (1966).

[4] 542 U.S. 600, 618-22 (2004) (Kennedy, J., concurring in the judgment).

[5] *See* Maj. op. at 8 (finding Justice Kennedy's reasoning persuasive).

appellant has presented establishes that a "two-step interrogation technique was used [in this case] in a calculated way to undermine the *Miranda* warning." *See* Maj. op. at 10.

The court of appeals' majority opinion decided that Justice Souter's four-judge plurality opinion in *Seibert*[6] contains the Court's holding because, even though Justice Kennedy's one-judge opinion concurred in the judgment on "narrower" grounds, the "underlying rationales of Justice Kennedy's concurrence and [Justice Souter's] plurality opinion are so divergent that they render *Marks's* narrowest-grounds-interpretation rule inapplicable." *See Martinez,* 204 S.W.3d 914, 918-21 (Tex.App. – Corpus Christi 2006).[7] The court of appeals' majority opinion, however, decided that appellant loses under Justice

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[6] *See Seibert*, 542 U.S. at 604-18 (Souter, J., joined by Stevens, Ginsburg, and Breyer, JJ.).

[7] If this were so, Justice Souter's plurality opinion in *Seibert* could not contain a majority holding and would have little, if any, binding effect in this case. Under these circumstances, the Supreme Court's majority opinion in *Oregon v. Elstad* would arguably control the disposition of this case, and appellant would lose. *See Oregon v. Elstad,* 470 U.S. 298, 318 (1985) ("a suspect who has once responded to unwarned yet noncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite *Miranda* warnings"); *see also Seibert,* 542 U.S. at 612 n.4 (suggesting that the defendant would have lost under *Elstad); but see Seibert,* 542 U.S. at 622-29 (O'Connor, J., dissenting, joined by Rehnquist, C.J., and Scalia and Thomas, JJ.) (suggesting that defendant might have won under *Elstad*).

Souter's plurality opinion. *See id.* The court of appeals' dissenting opinion would have decided that Justice Kennedy's "narrower" one-judge concurring opinion in *Seibert* contains the Court's holding under *Marks's* narrowest-grounds approach and that appellant should win under this holding. *See Martinez,* 204 S.W.3d 924-28 (Yanez, J., dissenting).[8] I would decide that it is unnecessary to determine whether Justice Souter's or Justice Kennedy's plurality opinions in *Seibert* control the disposition of this case because appellant has not carried his burden to present a sufficient record showing that he wins under either one of these opinions. *See Word v. State,* 206 S.W.3d 646, 651-52 (Tex.Cr.App. 2006) (appellate courts should not presume error from a silent record and it is the appealing party's burden to present a record showing properly preserved, reversible error); *Rowell v. State,* 66 S.W.3d 279, 280-81 (Tex.Cr.App. 2001).

Appellant was convicted of capital murder (murder committed during a robbery) and sentenced to life in prison.[9] The evidence from appellant's trial shows that three people were shot during a robbery committed by appellant and another person, both of whom used firearms. One of the robbery victims died from his gunshot wounds. The other two independently

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[8] The court of appeals' dissenting opinion, therefore, would have decided that appellant wins under a "narrower" holding than the one that the court of appeals' majority opinion decided that appellant loses under.

[9] The state did not seek the death penalty.

identified appellant as one of the robbers from a photospread approximately two months after the incident.[10] They also identified appellant at trial as one of the robbers. The police questioned appellant on the day of his arrest, and appellant voluntarily made the videotaped custodial statement at issue in this case in response to police questioning after receiving and waiving his *Miranda* rights. This statement was admitted into evidence at appellant's trial. Appellant claimed in this statement that he was in a nearby car acting as a lookout while others robbed the victims.[11]

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[10] During closing jury arguments, the state claimed that it was significant that both victims independently identified appellant as one of the robbers (apparently comparing the chances of this to winning the lottery):

> [STATE]: Mr. Camilo couldn't look at him or point at him. They scared the hell out of him. But what's their motive? And, furthermore, let me ask you this, gee, because I want in on this. What are the odds that those two little Mexican men are going to pick the same defendant, the same man that had the shotgun pointed at them that night who also owns a shotgun, who also has a skinny friend that meets the description that was given by the name of James Ruiz and that also the defendant himself puts himself there? What are the odds? Boy, if that was a lottery ticket, we would all be rich and never have to work again. Wouldn't that be nice?

[11] Appellant's statement was the only evidence presented at appellant's trial that did not place appellant at the scene of the robbery where the victims were shot. All of the other evidence shows that appellant was at the scene of the robbery. Though the greater weight of the evidence presented at appellant's trial establishes that appellant was one of two armed robbers at the scene of the robbery, this evidence also raised a legitimate

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The state claimed at appellant's trial that appellant's statement was unworthy of belief, but that even this self-serving statement was sufficient to establish appellant's guilt.[12]

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question of whether appellant actually fired his weapon. Our review of the trial record indicates that whether appellant actually fired his weapon, and not whether he was at the scene of the robbery, was probably the most legitimately disputed factual issue at appellant's trial.

[12] For example, the state argued during closing jury arguments at appellant's trial:

> [STATE]: If you believe this defendant's statement, you take everything he says as true, says it here twice on this tape: I was a lookout. I was sitting in the car, looking around, knowing these guys were going to get a lick. You're a lookout and you're guilty of capital murder.
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> * * *
>
> Now [appellant's lawyer], would have you and she went on about, you know, this confession and all this suggestiveness and et cetera, et cetera, et cetera, as though the officers put these words in her client's mouth. Well, you know what? I watched that tape and you've got it in evidence and I counted at least seven times where the defendant in that particular tape says he's either a lookout or he's watching out. I don't believe that. I think that statement is totally self-serving and I think you probably all do, too. You're intelligent.
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> * * *
>
> Well, you know what? If you want to believe that statement, you go right ahead, but even–if you believe that statement, I don't, but if you do and it's up to you, you are the judges of the evidence before you.

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Appellant claimed on direct appeal that the trial court erroneously denied a motion to suppress this statement. Addressing the merits of this claim under the United States Supreme Court's fractured decision in *Seibert,* the court of appeals decided that *Seibert* did not require suppression of appellant's statement. We exercised our discretionary authority to review this decision.[13]

In *Seibert,* a police officer consciously decided to interrogate the in-custody defendant without providing *Miranda* warnings and obtained a confession. *See Seibert,* 542 U.S. at 604-06. After about a twenty-minute break, this same police officer provided the defendant with *Miranda* warnings and obtained basically the same confession after more interrogation during which the interrogating officer also confronted the defendant with some of her prior unwarned statements. *See id.* A Missouri trial court suppressed the initial unwarned confession, but admitted the later warned one. *See id.* The Missouri Supreme Court decided, in what appears to be a type of "fruit of the poisonous tree" analysis, that "[i]n the

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You believe it, fine. But if you believe what he says in that statement, he's guilty of capital murder.

[13] The ground upon which we granted review states:

Whether the Court of Appeals misapplied the standards of *Seibert* in determining that a proper and functional *Miranda* warning was given Appellant here and finding Appellant's custodial statement admissible.

circumstances here, where the interrogation was nearly continuous, . . . the second [warned] statement, clearly the product of the invalid first statement, should have been suppressed."[14] In its fragmented decision, a Supreme Court majority rejected a "fruits" analysis but ultimately agreed with the Missouri Supreme Court that the second warned confession should have been suppressed. *See Seibert,* 542 U.S. at 604-18 (Souter, J., joined by Stevens, Ginsburg and Breyer, JJ.) and at 618-22 (Kennedy, J., concurring in the judgment).

Justice Souter's plurality opinion in *Seibert* decided that this confession should have been suppressed, because by "any objective measure . . . it is likely that if the interrogators employ the technique of withholding warnings until after the interrogation succeeds in eliciting a confession, the warnings will be ineffective in preparing the suspect for successive interrogation, close in time and similar in content" and would "likely mislead and deprive a defendant of knowledge essential to his ability to understand the nature of his rights."[15] Justice Souter's plurality

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[14] *See State v. Seibert,* 93 S.W.3d 700, 701 (Mo. 2002), *aff'd,* 542 U.S. at 617; *but see Seibert,* 542 U.S. at 612 n.4.

[15] Justice Souter's plurality opinion sets out "a series of relevant facts that bear on whether *Miranda* warnings delivered midstream could be effective enough to accomplish their object: the completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and second, the continuity of police personnel, and the degree to which the

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opinion also described the facts in that case, which bear very little resemblance to the facts in the record that appellant has presented in this case:

> At the opposite extreme are the facts here, which by any objective measure reveal a police strategy adapted to undermine the *Miranda* warnings. (Footnote omitted). The unwarned interrogation was conducted in the station house, and the questioning was systematic, exhaustive, and managed with psychological skill. When the police were finished there was little, if anything, of incriminating potential left unsaid. The warned phase of questioning proceeded after a pause of only 15 to 20 minutes, in the same place as the unwarned segment. When the same officer who had conducted the first phase recited the *Miranda* warnings, he said nothing to counter the probable misimpression that the advice that anything Seibert said could be used against her also applied to the details of the inculpatory statement previously elicited. In particular, the police did not advise her that her prior statement could not be used. (Footnote omitted). Nothing was said or done to dispel the oddity of warning about legal rights to silence and counsel right after the police had led her through a

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interrogator's questions treated the second round as continuous with the first." *See Seibert*, 542 U.S. at 615; *see also Martinez*, 204 S.W.3d at 917, 921 (applying these factors to uphold admissibility of appellant's voluntary custodial statement).

> systematic interrogation, and any uncertainty on her part about a right to stop talking about matters previously discussed would only have been aggravated by the way Officer Hanrahan set the scene by saying "we've been talking for a little while about what happened on Wednesday the twelfth, haven't we?" (Citation to record omitted). The impression that the further questioning was a mere continuation of the earlier questions and responses was fostered by references back to the confession already given. It would have been reasonable to regard the two sessions as parts of a continuum, in which it would have been unnatural to refuse to repeat at the second stage what had been said before. These circumstances must be seen as challenging the comprehensibility and efficacy of the *Miranda* warnings to the point that a reasonable person in the suspect's shoes would not have understood them to convey a message that she retained a choice about continuing to talk. (Footnote omitted).

See Seibert, 542 U.S. at 616-17.

Justice Kennedy's concurring opinion asserted that Justice Souter's plurality opinion "cuts too broadly" by applying "an objective inquiry from the perspective of the suspect" to "both intentional and unintentional two-stage interrogations." *See Seibert,* 542 U.S. at 621-22 (Kennedy, J., concurring in the judgment). Justice Kennedy stated that he "would apply a narrower test applicable only in the infrequent case, such as we have here, in which the two-step

interrogation technique was used in a calculated way to undermine the *Miranda* warning." *See id.* Apparently agreeing with the rest of Justice Souter's plurality opinion, Justice Kennedy further stated that, where a "deliberate two-step strategy" is used, the postwarning statements "that are related to the substance of prewarning statements" must be excluded unless curative measures are taken before the postwarning statement is made. *See id.* These curative measures "should be designed to ensure that a reasonable person in the suspect's situation would understand the import and effect of the *Miranda* warning and of the *Miranda* waiver." *See id.* "For example, a substantial break in time and circumstances between the prewarning statement and the *Miranda* warning may suffice in most circumstances, as it allows the accused to distinguish the two contexts and appreciate that the interrogation has taken a new turn." *See id.*

In this case, appellant filed a motion to suppress his statement about a month before his trial began. His motion to suppress alleged, in relevant part, that:

> The written statements, admissions or confessions, if any were made, do not reflect that the proper admonitions were given, in violation of **Article 38.22, Section 2** of the **Texas Code of Criminal Procedure**; the **Fifth, Sixth** and **Fourteenth Amendments** to the **United States Constitution;** and **Article I, Section 10** of the **Texas Constitution.**

(Emphasis in original).

The only witness to testify at the suppression hearing was Officer Macario Sosa. He testified that he arrested appellant for this offense and took him to a police station, where they arrived at about 10:30 a.m. Appellant denied any involvement in the offense when Sosa and another officer asked appellant if he wanted to discuss it. Sosa testified that he had not "read [appellant] his [*Miranda*] rights at that time."[16]

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[16] The majority opinion asserts that the police "questioned appellant about the crime at the police station without giving the required [*Miranda*] warnings." *See* Maj. op. at 10. The record that appellant has presented reflects that, when Sosa initially brought appellant to the police station, appellant denied any involvement in the offense when Sosa and another officer asked appellant if he wanted to discuss it. The police asking appellant if he wanted to discuss it is not "interrogation" *for Miranda* purposes. *See Rhode Island v. Innis*, 446 U.S. 291, 301 (1980) ("interrogation" is any words or actions on the part of the police that the police should know are reasonably likely to elicit an incriminating response); *Moran v. State*, 213 S.W.3d 917, 922-23 (Tex.Cr.App.), *cert. denied*, 128 S.Ct. 235 (2007) (police officer's comment to in-custody defendant that the police had spoken to other witnesses just after defendant had invoked his right to counsel when police asked defendant if he wanted to discuss the offense was not "interrogation" thus not requiring exclusion of defendant's subsequent incriminating statement). The police were, therefore, not required to provide *Miranda* warnings before asking appellant if he wanted to discuss it. Even if it could be said that the police "questioned appellant about the crime" for *Miranda* purposes when they initially brought him to the police station, appellant's denial of any involvement in the offense after the police asked him if he wanted to discuss it was nothing like the twenty or thirty minute, unwarned interrogation in *Seibert* that produced the defendant's incriminating statement, which she repeated about twenty minutes later during the same interrogation. *See Seibert*, 542 U.S. at 604-05.

Apparently not satisfied with appellant's answer denying any involvement in the offense, Sosa then arranged for appellant to take a polygraph examination. These arrangements took about an hour during which time appellant was not questioned by the police.[17] Although Sosa did not specifically inform appellant that "he didn't have to take the polygraph or talk to anybody about this offense," he did ask him if he was willing to do so.[18] An "unknown polygrapher" conducted the polygraph examination, which lasted about three or four hours until about 4:30 p.m. Sosa was not present during the polygraph examination. Sosa testified at the suppression hearing that he did not know whether the polygraph examiner informed appellant of his *Miranda* rights.

> Q. [DEFENSE]: So the polygraph examiner gives the person information as they're asking questions about the offense; is that correct?

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[17] Sosa testified that the polygrapher reviews the entire case file in order to decide which questions to ask during the polygraph examination.

[18] The record appears to reflect that appellant agreed to take the polygraph examination after Sosa asked him if he was willing to do so.

> Q. [DEFENSE]: Like I said, up until that time, you had never given him any indication that he didn't have to take the polygraph or talk to anybody about this offense?
>
> A. [SOSA]: I had basically asked him if he was willing to take a polygraph in regards to this incident.

> A. [SOSA]: I wasn't present so I can't tell you exactly what happened during the examination.
>
> Q. So you can't say for sure that the polygrapher did not provide him with details of the offense in order to ask him questions?
>
> A. I can't say whether he provided details and *Miranda* warnings, what have you, no, ma'am.[19]

When the polygraph examination was over, Sosa was informed by the polygraph examiner that appellant had "failed" it.[20] The record is otherwise silent on

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[19] The court of appeals (as does this Court) apparently considered this testimony to mean that appellant was not *Mirandized* before the polygraph examination. *See Martinez*, 204 S.W.3d at 921 ("The instant case presents *a Seibert* problem because [appellant] made *pre-Miranda* statements to police officers and a polygraph examiner, was then given separate *Miranda* warnings by a magistrate and the interrogating officers, and finally appeared in a videotaped interrogation that was admitted into evidence at trial."). This testimony, however, does not establish that appellant was not *Mirandized* before the polygraph examination. The record is actually silent on this critical issue under Seibert. This issue is critical under *Seibert*, because, if appellant was *Mirandized* before the polygraph examination, then he loses under any reading of *Seibert*.

[20] The record is silent on which portions of the three to four-hour polygraph examination that appellant "failed." For all we know, appellant could have "failed" portions of the polygraph that were unrelated to this offense (e.g., appellant could have given a false name resulting in him "failing" the polygraph). Sosa also testified that it would be more accurate to say that "Deception was indicated" on certain questions, but that he did

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just exactly what occurred during the three to four-hour polygraph examination.[21]

Sosa informed appellant that he had "failed" the polygraph examination[22] and then took appellant

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not know "the precise questions that were asked that supposedly reflected deception."

> Q. [DEFENSE]: I believe I said earlier that you told [appellant] he failed. In fact, that's not what a polygraph examiner would say to you; isn't that true? Someone doesn't fail or pass a polygraph, do they?
>
> A. [SOSA]: No, that's not a correct term.
>
> Q. So it would be more correct to say the polygraph expert or examiner would say to you: Deception was indicated on this question or that question?
>
> A. They would have given a percentage or degree of deception, yes, ma'am, per question.
>
> Q. But, again, without those records, you don't recall the precise questions that were asked that supposedly reflected deception?
>
> A. No, ma'am.

[21] *See Martinez*, 204 S.W.3d at 916 (noting that a "record was not created of the questions, statements, or results of the polygraph examination"); *compare Seibert*, 542 U.S. at 613 ("The unwarned interrogation was conducted in the station house, and the questioning was systematic, exhaustive, and managed with psychological skill. When the police were finished there was little, if anything, of incriminating potential left unsaid.").

[22] Arguably, this is the only evidence that might raise a viable issue under *Seibert*, since it is possible that appellant "would hardly think he had a genuine right to remain silent" after being told that he had "failed" a polygraph examination. One could speculate on this silent record that appellant, having initially denied any involvement in the offense when first brought to the police station, continued to deny any involvement in the offense during the polygraph examination and that, when

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before a magistrate, who informed appellant of his *Miranda* rights at about 4:55 p.m. Sosa then took appellant to another police station where Sosa again informed appellant of his *Miranda* rights at about 5:16 p.m. This was the first time that Sosa personally informed appellant of his *Miranda* rights. Appellant waived these rights and voluntarily provided the statement at issue in this case while being questioned by Sosa and another officer. The police stopped questioning appellant at 6:08 p.m. During this interview of appellant, the police did not refer to, or confront appellant with, any statements (incriminating or otherwise) that appellant may have made during the polygraph examination and the police did not repeat that appellant had "failed" the polygraph examination.[23]

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confronted by the police with having "failed" the polygraph, he hardly thought he had a genuine right to remain silent (in part because he could have thought that the "failed" polygraph could be used against him later at trial) and, thus, after receiving his *Miranda* warnings twice, gave the somewhat incriminating statement that minimized his involvement in the offense but still placed him at the scene (the statement that the state argued at trial still established his guilt). This is another reason why it might be critical for the record to reflect whether or not appellant received *Miranda* warnings before the polygraph examination and what actually occurred during the polygraph examination.

[23] *Compare Seibert*, 542 U.S. at 616 ("When the same officer who had conducted the first phase recited the *Miranda* warnings, he said nothing to counter the probable misimpression that the advice that anything Seibert said could be used against her also applied to the details of the inculpatory statement previously

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Appellant's closing statement at the suppression hearing presented a smorgasbord of reasons for suppressing appellant's statement. None of these reasons, however, presented a claim that appellant's statement, "clearly the product of [any] invalid first statement, should have been suppressed"[24] or that appellant had not been "adequately and effectively" apprised of his *Miranda* rights before he made this statement.[25]

> [DEFENSE]: Your Honor, just preliminarily, we note the lack of an expressed waiver of rights at the beginning of the videotape basically with the detective, knowing these rights, do you want to talk? There is no express waiver of the rights; however, more importantly, we ask you to consider the day-long worth of activities that seem to be quite

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elicited. In particular, the police did not advise that her prior statement could not be used. [Footnote omitted]. Nothing was said or done to dispel the oddity of warning about legal rights to silence and counsel right after the police had led her through a systematic interrogation, **and any uncertainty on her part about a right to stop talking about matters previously discussed would only have been aggravated by the way Officer Hanrahan set the scene by saying 'we've been talking for a little while about what happened on Wednesday the twelfth, haven't we?'** [Citation omitted]. **The impression that the further questioning was a mere continuation of the earlier questions and responses was fostered by references back to the confession already given.")** (emphasis supplied).

[24] *See Seibert*, 93 S.W.3d at 701.

[25] *See Seibert*, 542 U.S. at 611-13.

vague in Detective Sosa's mind, the lack of any record-keeping, the inability to explain what's been going on, what was talked about all day long, the lack, most importantly, of any reading of rights or *Miranda* warnings during all the questioning that occurred throughout the day by the polygraph examiner and then through these huge blanks of time up until the trip to the magistrate, which did not occur until almost 5:00 o'clock.

We submit those are not sufficient intervening circumstances to remove any taint. First of all, the lack of warnings before the day's questioning and then on the tape itself. We urge you to consider the coercive techniques that are used, the argumentation of [appellant's] refusal to accept his denials of guilt, the suggestion made that there is evidence that exists when it doesn't truly exist and so forth. And we also urge you to consider Detective Sosa's lack of memory concerning the events surrounding the taking of the statement also raise some question about the credibility involved with regard to what he says about what was done. We urge you to suppress the statement.[26]

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[26] It is also noteworthy that appellant raised no claim or issue during the suppression hearing that Sosa informing him that he had "failed" the polygraph examination caused the subsequent giving of the *Miranda* warnings to him to be ineffective such that he "hardly [thought] he had a genuine right to remain silent."

In its closing statement at the suppression hearing, the state argued that appellant voluntarily made the statement after receiving, understanding and waiving his *Miranda* rights.

> [STATE]: Very brief, Judge. All I would do is reoffer, of course, the videotape that you heard and take into consideration everything that Officer Sosa said in terms of [appellant] not being forced, threatened, promised, anything in any way to give the statement that he did, that his *Miranda* warnings were given properly, they were read off the blue card, State's Exhibit No. 2. Specifically after each warning, the defendant was asked whether or not he understood that right. He did. He did it again on the videotape. He was–not only purchased food and drink, allowed to go to the rest room, allowed to make phone calls, bottom line, Judge, is his statement was voluntarily made.[27]

The trial court denied appellant's motion to suppress based on findings that appellant "did freely, voluntarily and knowingly waive his rights to remain silent and give that statement." The trial court made the following ruling:

> [THE COURT]: I am going to admit the statement. I make a specific finding I have

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[27] Appellant made no claim that this failed to address whether the *Miranda* warnings that he received before making the statement "adequately and effectively" apprised him of these rights.

> found Officer Sosa to be a credible witness. The arrest warrant is a good arrest warrant. It appeared that [appellant] did freely, voluntarily and knowingly waive his rights to remain silent and give that statement. There was no testimony of any threats. The behavior of Officer Sosa appears to be exemplary and it is admitted.[28]

When the state offered appellant's statement into evidence at appellant's trial just two days after the suppression hearing, appellant reurged his "earlier objection" and for the first time directed the trial court's attention to "*Missouri v. Seibert*."

> [STATE]: At this time I'm going to offer 1A into evidence.
>
> [DEFENSE]: Your Honor, at this time we reurge our earlier objection and just to add to it, a reference to *Missouri v. Seibert,* S-E-I-B-E-R-T, U.S. Supreme Court case, pending, No. 02-1371.[29]

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[28] Appellant made no claim that this ruling failed to address any claim that the *Miranda* warnings that appellant received before making the statement did not "adequately and effectively" apprise him of these rights.

[29] It is, therefore, clear that appellant could have alerted the trial court to the Missouri Supreme Court's decision in *Seibert* during the suppression hearing just two days before. Appellant's trial took place between May 19, 2003, and May 23, 2003, with the motion to suppress hearing also occurring on May 19, 2003. The Missouri Supreme Court had handed down its decision in *Seibert* about six months before this on December 10, 2002. *See State v. Seibert,* 93 S.W.3d at 700. On May 19, 2003, the Supreme

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> [THE COURT]: My ruling stands the same. Admitted.

Appellant's claim for suppressing his statement became even more focused and clear in his brief on direct appeal. In addition to containing a citation to the Missouri Supreme Court's decision in *Seibert*, appellant's brief on direct appeal also presented the argument that the admission into evidence of his statement was constitutional error, because "the unwarned and the warned questioning occurred as an uninterrupted and continuous process." Among other things, appellant argued in his brief on direct appeal:

> What occurred here was that the unwarned interrogation process, including submitting Appellant for polygraphing, was used tactically to get Appellant to make admissions before he was aware of his legal rights. That Appellant eventually received his warnings before the video recorder was turned on was too little too late after about hours [sic] of custodial interrogation.

In *Miranda*, the Supreme Court, having concluded that in-custody interrogation of a suspect by

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Court exercised its writ of certiorari jurisdiction to review the Missouri Supreme Court's decision. *See Missouri v. Seibert*, 538 U.S. 1031 (2003). The Supreme Court handed down its decision in *Seibert* on June 28, 2004, about one week after appellant filed his brief on direct appeal in the court of appeals. *See Seibert*, 542 U.S. at 600; *Martinez*, 204 S.W.3d at 924 n.19 (Yanez, J., dissenting). Appellant's brief on direct appeal also cited to the Missouri Supreme Court's decision in *Seibert*.

the police is "inherently compelling," decided that it was constitutionally necessary for the police to "**adequately and effectively apprise[ ]**" the in-custody suspect of certain rights, such as the right to remain silent, before interrogation can begin in order "to combat these [inherently compelling] pressures and to permit [the suspect] a full opportunity to exercise the [Fifth Amendment] privilege against self-incrimination (sic)." *See Miranda,* 384 U.S. at 445-58, 467 (emphasis supplied).[30] Justice Souter's plurality opinion in *Seibert* decided that the "question-first" interrogation technique of informing an in-custody suspect of his *Miranda* rights in the middle of a "coordinated and continuing interrogation" after the suspect has fully confessed does not "adequately and effectively apprise[ ]" this suspect of his rights. *See Seibert,* 542 U.S. at 611-14. This opinion states:

> When a confession so obtained is offered and challenged, attention must be paid to the conflicting objects of *Miranda* and question-first. *Miranda* addressed "interrogation practices . . . likely . . . to disable [an individual] from making a free and rational choice" about speaking, (citation omitted), and held

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[30] There is no Fifth Amendment right "against self-incrimination." The Fifth Amendment right at issue in *Miranda* and cases like this is a person's right not "to be **compelled** in any criminal case to be a witness against himself" (emphasis supplied). U.S. Const. amend. V. Requiring an in-custody suspect to be informed of his *Miranda* rights before the police can question him apparently is intended to safeguard this right. *See Miranda,* 384 U.S. at 467, 478-79.

that a suspect must be "**adequately and effectively**" advised of the choice the Constitution guarantees, (citation omitted). The object of question-first is to render *Miranda* warnings ineffective by waiting for a particularly opportune time to give them, after the suspect has already confessed.

Just as "no talismanic incantation [is] required to satisfy [*Miranda's*] strictures," (citation omitted), it would be absurd to think that mere recitation of the litany suffices to satisfy *Miranda* in every conceivable circumstance. "The inquiry is simply whether the warnings reasonably 'conve[y] to [a suspect] his rights as required by *Miranda*.'" (Citations omitted). The threshold issue when interrogators question first and warn later is thus whether it would be [objectively] reasonable to find that in these circumstances the warnings could function "effectively" as *Miranda* requires. Could the warnings effectively advise the suspect that he had a real choice about giving an admissible statement at that juncture? Could they reasonably convey that he could choose to stop talking even if he had talked earlier? For unless the warnings could place a suspect who has just been interrogated in a position to make such an informed choice, there is no practical justification for accepting the formal warnings as compliance with *Miranda*, or for treating the second stage of interrogation as distinct from the first, unwarned and inadmissible segment. (Footnote omitted).

There is no doubt about the answer that proponents of question-first give to this question about the effectiveness of warnings given only after successful interrogation, and we think their answer is correct. By any objective measure, applied to the circumstances exemplified here, it is likely that if the interrogators employ the technique of withholding warnings until after interrogation succeeds in eliciting a confession, the warnings will be ineffective in preparing the suspect for successive interrogation, close in time and similar in content. After all, the reason that question-first is catching on is as obvious as its manifest purpose, which is to get a confession the suspect would not make if he understood his rights at the outset; the sensible underlying assumption is that with one confession in hand before the warnings, the interrogator can count on getting its duplicate, with trifling trouble. **Upon hearing warnings only in the aftermath of interrogation and just after making a confession, a suspect would hardly think he had a genuine right to remain silent, let alone persist in so believing once the police began to lead him over the same ground again.** (Footnote omitted). A more likely reaction on a suspect's part would be perplexity about the reason for discussing rights at that point, bewilderment being an unpromising frame of mind for knowledgeable decision. What is worse, telling a suspect that "anything you say can and will be used against you," without expressly excepting the statement

> just given, could lead to an entirely reasonable inference that what he has just said will be used, with subsequent silence being of no avail. Thus, when *Miranda* warnings are inserted in the midst of coordinated and continuing interrogation, they are likely to mislead and "depriv[e] a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them." (Citation omitted). By the same token, it would ordinarily be unrealistic to treat two spates of integrated and proximately conducted questioning as independent interrogations subject to independent evaluation simply because *Miranda* warnings formally punctuate them in the middle.

Id. (emphasis supplied).

Justice Souter's plurality opinion in *Seibert,* therefore, sets out a rule that first providing *Miranda* warnings to an in-custody suspect in the middle of a nearly continuous interrogation after the suspect has just confessed is the same as providing no *Miranda* warnings at all. If the police then obtain another warned confession during this nearly continuous interrogation process in the absence of any "curative measures," this confession must be suppressed, since this confession will be considered to have been obtained without the requisite prophylactic *Miranda*

warnings.[31] *See Seibert*, 542 U.S. at 611-16. Justice Kennedy's concurring opinion apparently agrees except to require "that the two-step [or question-first] interrogation technique was used in a calculated way to undermine the *Miranda* warning." *See Seibert*, 542 U.S. at 622 (Kennedy, J., concurring in the judgment).[32] Both of these opinions, therefore, considered it significant (almost dispositive) that the unwarned interrogation produced a confession that was repeated almost verbatim a very short time later (about twenty minutes) during a warned interrogation. The statement in this Court's opinion that it "is immaterial to our consideration whether incriminating

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[31] *See Seibert*, 542 U.S. at 608 (*Miranda* conditioned the admissibility at trial of any custodial confession on warning a suspect of his rights); *Miranda*, 384 U.S. at 476 (giving of warnings is prerequisite to admissibility of custodial confession).

[32] The court of appeals' majority opinion in this case, therefore, may have erroneously decided that "the underlying rationales of Justice Kennedy's concurrence and the plurality opinion [of Justice Souter] are so divergent that they render *Marks's* narrowest-grounds-interpretation rule inapplicable." *See Martinez*, 204 S.W.2d at 920. It would appear that Justice Kennedy's concurring opinion might contain the holding in *Seibert* under *Marks's* narrower-grounds approach. *See also Martinez*, 204 S.W.3d at 920 n.5 (noting that the Fifth Circuit has decided in two recent unpublished decisions that Justice Kennedy's concurrence sets out the holding in *Seibert*). The defendant in *Seibert* won under Justice Souter's and Justice Kennedy's plurality opinions apparently because these opinions agreed that the question-first interrogation technique in *Seibert* was used in a calculated way to undermine and did undermine the *Miranda* warning. *See Seibert*, 542 U.S. at 616 n. 6 (Souter, J.) and at 620 (Kennedy, J.).

statements emerged from the unwarned interrogation"[33] ignores the most significant component of *Seibert* that led the Court to conclude that the *Miranda* warnings provided to the defendant, just twenty minutes after she provided a complete confession during an unwarned interrogation, failed to "adequately and effectively" inform the defendant that she did not have to provide another confession. *See, e.g., Seibert,* 542 U.S. at 615 (some relevant facts that "bear on whether *Miranda* warnings delivered midstream could be effective enough to accomplish their object" are "the completeness and detail of the questions and answers in the first round of interrogation [and] the overlapping content of the two statements").

Assuming that appellant preserved a *Seibert* claim for appellate review,[34] appellant has not presented a

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[33] *See* Maj. op. at 14.

[34] Arguably, the record from the suppression hearing reflects that neither the trial court, based on its ruling at the suppression hearing, nor the state, based on its closing statements at the suppression hearing, understood appellant to be making a claim based on the principles discussed in either the United States Supreme Court's or the Missouri Supreme Court's decisions in *Seibert* (which could explain the lack of a complete record on what exactly occurred during the polygraph examination, particularly a critical issue under *Seibert* of whether appellant actually received *Miranda* warnings prior to the polygraph examination). *See Buchanan v. State,* 207 S.W.3d 772, 775 (Tex.Cr.App. 2006) ("When the objection is not specific, and the legal basis is *not* obvious, it does not serve the purpose of the contemporaneous-objection rule for an appellate court to reach

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record showing that he is entitled to relief under *Seibert*. The record does not show that the police actually used the "question-first" interrogation technique described in *Seibert*, and that, if they did use such a tactic, they did so in a calculated way to undermine the *Miranda* warning. This record does not support a finding that appellant had just confessed during a nearly continuous and uninterrupted interrogation process when Sosa informed appellant of his *Miranda* rights and obtained the statement at issue here.[35]

The incomplete record that appellant has presented does show that, when appellant was first brought to the police station, the police did not interrogate him for purposes of *Miranda*[36] and appellant did not make any unwarned incriminating statements that the police later used during the warned interview. And, because the record is silent on exactly what occurred during the polygraph examination, it

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the merits of a forfeitable issue that is essentially raised for the first time on appeal.") (emphasis in original).

[35] *Compare Jones v. State*, 119 S.W.3d 766, 775 (Tex.Cr.App. 2003) (defendant's warned statement inadmissible because "the unwarned and warned statements in this case were given during a nearly undifferentiated single event, taking place in the same room as an uninterrupted and continuous process").

[36] And even if it could be said that the single question by the police to appellant asking him if he wanted to discuss it was interrogation for *Miranda* purposes, it is clear that this does not resemble the unwarned interrogation in *Seibert* that produced a confession.

is difficult, if not impossible, to conclude that something may have transpired during this polygraph examination to cause the subsequent giving of the *Miranda* warnings to be ineffective.[37] Such a conclusion would be based on pure speculation.[38] The record that appellant

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[37] Appellant presented no evidence at the suppression hearing (such as, for example, he was not informed of his *Miranda* rights before the polygraph examination or that he fully confessed during this examination) that would even raise an issue of whether something may have transpired at the polygraph examination or thereafter that might have caused the subsequent giving of the *Miranda* warnings to be ineffective. *Compare Seibert,* 542 U.S. at 605-06 (interrogating officer testified at suppression hearing that he "made a 'conscious decision' to withhold *Miranda* warnings, thus resorting to an interrogation technique he had been taught; question first, then give the warnings, and then repeat the question 'until I get the answer that she's already provided once'") and at 616 n.6 (noting that the "intent of the [interrogating] officer will rarely be as candidly admitted as it was here"). Under these circumstances, the state never assumed any burden to prove that the polygraph examination (or any interrogation technique that the police could have been using) caused the subsequent giving of the *Miranda* warnings to be ineffective. *See State v. Kelly,* 204 S.W.3d 808, 819 n.22 (Tex.Cr.App. 2006) (state does not assume burden to prove voluntariness of a defendant's confession unless the defendant carries initial burden to present evidence to support finding of involuntariness) (citing *State v. Terrazas,* 4 S.W.3d 720, 727 (Tex.Cr.App. 2006).

[38] It is significant that the videotaped interview clearly reflects that the police did not refer to, or confront appellant with, any statements (incriminating or otherwise) that appellant may have made during the polygraph examination. *See Seibert,* 542 U.S. at 604 (interrogating officer follows unwarned confession with *Miranda* warnings "and then leads the suspect to cover the same ground a second time") and at 605 (during warned interrogation, interrogating officer confronts suspect

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has presented does not establish that someone in appellant's position "would hardly think that he had a genuine right to remain silent" when he voluntarily provided the custodial statement at issue in this case after being informed of and waiving his *Miranda* rights. *See Word,* 206 S.W.3d at (appealing party has burden to present a record showing properly preserved, reversible error).

The majority opinion permits appellant to win by presenting an incomplete record showing no reversible error with gaping holes of silence on critical issues, based on the assertion that this Court has "long held that the prosecution bears the burden of proving admissibility when a *Miranda* violation is found." *See* Maj. op. at 11 (citing *Creager v. State,* 952 S.W.2d 852, 860 (Tex.Cr.App. 1997) and *Alvarado v. State,* 912 S.W.2d 199, 211 (Tex.Cr.App. 1995)). The cases cited in the majority opinion do not support a holding that the appealing party can present an incomplete and silent record showing no reversible error and win.[39]

The majority opinion's citation to *Creager* cites to a concurring opinion in *Creager* which sets out the unremarkable proposition that "[w]hen the State

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with her unwarned statements); *Martinez,* 204 S.W.3d at 921 (noting that appellant "was repeating the polygrapher's general statements regarding the crime [that three people were shot], not his own unwarned statements").

[39] Our case law is actually to the contrary. *See Word,* 206 S.W.3d at 651-52.

bears the burden of proof on a motion in which the defendant seeks to suppress a statement, which he claims was obtained in violation of *Miranda,* the State need prove waiver only by a preponderance of the evidence." *See Creager,* 952 S.W.2d at 860 n.2 (Meyers, J., concurring). *Alvarado* did not involve a claimed *Miranda* violation, and the defendant in *Alvarado,* rather than relying on an incomplete and silent record, actually testified and presented other evidence at a suppression hearing that raised the issue of the voluntariness of his confession before the state was put to its burden to prove voluntariness. *See Alvarado,* 912 S.W.2d at 210-11;[40] *see also Kelly v. State,* 204 S.W.3d at 819 n.22 (state does not assume burden to prove voluntariness of a defendant's confession unless the defendant carries initial burden to raise an issue of involuntariness of the confession).

A defendant has always been required to make some initial showing on the record in the trial court that raises a legitimate issue of whether he is entitled to relief under the specific claim that he presents (usually by making an evidentiary showing that would support the claim). *See Herrera v. State,* 241 S.W.3d 520, 526-27 (Tex.Cr.App. 2007) (mere filing of motion to suppress does not thrust burden on the

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[40] Rather than relying on a silent record, the defendant in *Alvarado* actually presented evidence that, if believed by the factfinder, would have supported a finding that the defendant's confession was involuntary placing the burden on the state to prove voluntariness. *See Alvarado,* 912 S.W.2d at 210-11.

state to show compliance with *Miranda* unless and until defendant proves that statements he wishes to exclude were result of custodial interrogation) and at 533-34 (Cochran, J., concurring) ("The right to *Miranda* warnings applies once the defendant establishes that the setting is one of custodial interrogation. [Footnote omitted]. Only then does the State have a 'heavy burden' to establish that *Miranda* warnings were given and that the defendant voluntarily waived those rights and voluntarily responded to custodial questioning.").[41] Only then does the burden shift to the state to defeat this specific claim with its failure to do so being grounds for a successful appeal by the other party. *See id.* The Court's decision is based on the state's failure to prove something that it never had the burden to prove, because appellant never "raised" the issue.[42]

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[41] *See also Kelly*, 204 S.W.3d at 819 n.22 (defendant had initial burden to produce evidence to support finding that she did not consent to blood draw); *Ford v. State*, 158 S.W.3d 488, 492 (Tex.Cr.App. 2005) (defendant, claiming Fourth Amendment violation, bears initial burden of producing evidence to support finding of improper police conduct such as proving that a search occurred without a warrant shifting the burden to the state to establish the validity of the search); *Terrazas*, *4* S.W.3d at 727 (state never assumed burden to prove voluntariness of defendant's confession because defendant did not carry her initial burden of raising an issue of voluntariness).

[42] For example, appellant's suppression motion did not raise an issue of the effectiveness of the *Miranda* warnings that appellant received. Appellant's suppression motion alleged that "proper admonitions" were not given. This is quite different from alleging that "proper admonitions" were given but that these

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In this case, the state carried its "heavy burden" in the trial court to establish that *Miranda* warnings were given and that appellant voluntarily waived his *Miranda* rights and voluntarily responded to custodial questioning producing the videotaped statement at issue in this case. If appellant really meant to put the trial court and the other party on notice that it needed to prove that these warnings really did not "adequately and effectively" apprise him of these rights, then he should have said so instead of remaining silent. In other words, he should have "raised" this issue.

I respectfully dissent.

Hervey, J.

"proper admonitions" did not "adequately and effectively" apprise appellant of his rights under *Miranda*. The allegation in appellant's suppression motion and the arguments he made at the suppression hearing certainly did not put any burden on the State to prove that these "proper admonitions" were ineffective. The state responded to the only claim presented in appellant's suppression motion when it proved at the suppression hearing that "proper admonitions" were, in fact, given.

Arguably, appellant's citation to "*Seibert*" during the middle of trial two days after the suppression hearing raised the issue of the effectiveness of the warnings. I would, however, decide that this, coming as it did just two days after the suppression hearing in the middle of trial without any further explanation of why "*Seibert*"would require a different result, still did not raise any issue as to the effectiveness of the warnings under *Seibert*.

Filed: December 17, 2008
Publish

[SEAL]

NUMBER 13-03-388-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

RAUL ADAM MARTINEZ, JR. **Appellant,**

v.

THE STATE OF TEXAS, **Appellee.**

On appeal from the
248th District Court of Harris County, Texas.

OPINION

Before Chief Justice Valdez and
Justices Yanez and Castillo
Opinion by Chief Justice Valdez

Appellant, Raul Adam Martinez, Jr., was convicted of capital murder and sentenced to life in prison. Martinez contends the trial court made a constitutional error by denying his motion to suppress a videotaped statement he made to police. The sole point of error on appeal is that Martinez's videotaped statement should not have been admitted into evidence at trial because it was made during an interrogation that began without *Miranda* warnings, even though Martinez was given the appropriate warnings just prior to making the statement.

Appellee, the State, responds that: (1) Martinez has not met the burden of presenting and developing a record to show error requiring reversal; (2) neither a substantive interrogation nor an incriminating statement occurred before Martinez voluntarily waived his constitutional rights by making the statement; and (3) Martinez was not harmed by the admission of his videotaped statement. We affirm the trial court's judgment.

I. BACKGROUND

A. Factual Background

Martinez was arrested by Officer Macario Sosa for the capital murder of Manuel Arriaga-Molina. During the arrest, Sosa handcuffed Martinez, told him he was under arrest for capital murder, placed him in a police car, and drove him to the police station. No *Miranda* warnings were given at the scene of the arrest or at the police station. Upon arriving at the police station, Sosa and his partner, Sergeant Hernandez, asked Martinez if he wanted to speak with them about the incident. The three briefly discussed the incident, but Martinez denied knowing anything about it.

Shortly after his brief discussion with the officers, Martinez was turned over to another officer, who administered a polygraph test. It took the polygrapher three to four hours to create the test questions from the case file and administer the test. The record does not contain the questions asked during the test

or a report of the test. Martinez was then returned to Officers Sosa and Hernandez and allowed to use the bathroom, telephone his father, and eat. At this point, Officers Sosa and Hernandez confronted Martinez with the fact that areas of deception had been detected during the polygraph test. They then took Martinez from the police station to a municipal court, where he was given his statutory and constitutional warnings by a magistrate. From municipal court, Martinez was taken to a different police station and placed in an interrogation room. Finally, Officers Sosa and Hernandez sat down with Martinez, gave him *Miranda* warnings, and questioned him; the interrogation was videotaped.

B. Procedural Background

A suppression hearing to determine the admissibility of Martinez's videotaped statement was held shortly before trial; Officer Sosa was the only witness. Officer Sosa described the aforementioned arrest and interrogation process. Martinez's defense counsel highlighted the fact that during his recorded statement, Martinez made two references to statements he was told by another officer. The statements were made when Officers Sosa and Hernandez conveyed the gravity of the situation by reminding Martinez that three people were shot and one was killed. Martinez casually pointed to the wall and responded, "[t]hat's what the dude told me over there." Officer Sosa testified that Martinez was referring to the polygraph examiner. A record was not created of the

questions, statements, or results of the polygraph examination. The trial court denied Martinez's motion to suppress his videotaped statement.

II. DISCUSSION

Martinez contends that his videotaped confession was the product of a type of "question-first" interrogation made unconstitutional by the U.S. Supreme Court.[1] Martinez argues that the unwarned and warned portions of the interviews were done as part of a tactically continuous process aimed at getting him to make admissions before he was aware of his legal rights. He asks us to apply the Fifth Amendment analysis used in *Missouri v. Seibert*, 542 U.S. 600 (2004). *See* U.S. CONST. amend V.

A. The *Seibert* Case

The *Seibert* case involved murder and questionable police conduct. Patrice Seibert's 12-year-old son, Jonathan, had cerebral palsy, and when he died in his sleep, she feared charges of neglect because of bedsores on his body. She allowed her other son and a friend to "torch" her mobile home while Jonathan's body and Donald, a mentally ill teenager staying with

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[1] *Missouri v. Seibert*, 542 U.S. 600 (2004), was handed-down a few days after Martinez filed his brief. Martinez's brief relies upon *State v. Seibert*, 93 S.W.3d 700 (Mo. 2002), *cert. granted* 123 S. Ct. 2091 (2003). No supplemental brief was filed after the Supreme Court handed-down its opinion.

Seibert, were inside. Donald was left inside the home to avoid any appearance that Jonathan had been unattended. When the local police arrested Seibert, they intentionally questioned her without *Miranda* warnings for 30 to 40 minutes. During the questioning, an officer squeezed Seibert's arm and repeated, "Donald was also to die in his sleep." After Seibert admitted she knew Donald was meant to die in the fire, she was given a 20-minute coffee and cigarette break. She was then returned to the same room by the same officer, given *Miranda* warnings, and waived those warnings. The questioning during this session began, "Ok, 'trice, we've been talking for a little while about what happened. . . . "

Seibert was charged with first-degree murder for her role in Donald's death. At a supression hearing before trial, she sought to exclude both her pre-warning and post-warning statements. The trial court excluded only her pre-warning statements and she was convicted of second-degree murder. On appeal, the U.S. Supreme Court, in a plurality opinion, affirmed.

Justice Souter's opinion, which was joined by three other Justices, held that "[t]he threshold issue when interrogators question first and warn later is . . . whether it would be reasonable to find that in these circumstances the warnings could function 'effectively' as *Miranda* requires." *Seibert*, 542 U.S. at 611-12. Any *Miranda* warning "inserted in the midst of [a] coordinated and continuing interrogation" is problematic; and unless "a reasonable person in the

suspect's shoes could have seen the station house questioning as a new and distinct experience, [and thus] the *Miranda* warnings could have made sense as presenting a genuine choice whether to follow up on the earlier admission," the plurality would find the post-warning statements inadmissible. *Id.* at 614-16. The plurality set forth five "relevant facts that bear on whether *Miranda* warnings delivered midstream could be effective:"

> [1] the completeness and detail of the questions and answers in the first round of interrogation, [2] the overlapping content of the two statements, [3] the timing and setting of the first and the second, [4] the continuity of police personnel, and [5] the degree to which the interrogator's questions treated the second round as continuous with the first.

Id. at 615. These factors, all of which concern the relationship between the first and second interrogations, are intended to aid courts in determining whether an initial, unwarned interrogation operates to "thwart *Miranda's* purpose of reducing the risk that a coerced confession would be admitted." *Id.* at 617.

Justice Kennedy concurred in the judgment, but on "narrower" grounds. *Id.* at 622 (Kennedy, J., concurring in judgment only). Like the plurality, Justice Kennedy wrote that "[t]he interrogation technique used in this case is designed to circumvent *Miranda v. Arizona*," and "statements obtained through the use of this technique are inadmissible."

Id. at 618. For Justice Kennedy, however, the plurality's test, which "envisions an objective inquiry from the perspective of the suspect, and applies in the case of both intentional and unintentional two-stage interrogations, . . . cuts too broadly." *Id.* at 621-22. Instead, in Justice Kennedy's view, unless the police used "the two-step interrogation technique . . . in a calculated way to undermine the *Miranda* warning, then "[t]he admissibility of postwarning statements should continue to be governed by the principles of "*Elstad*."[2] *Id.* at 622. In those "infrequent case[s]" where the interrogating officer deliberately uses the two-step strategy, "postwarning statements that are related to the substance of prewarning statements must be excluded unless curative measures are taken before the postwarning statement is made." *Id.* If the two-step method was used deliberately, the interrogating officer must take "curative measures . . . designed to ensure that a reasonable person in the

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[2] *Oregon v. Elstad*, 470 U.S. 298, 301, 314-16 (1985). In *Elstad*, the police went to a young suspect's house to take him into custody on a charge of burglary. *Id.* One officer spoke with the mother in the kitchen, while another briefly waited with the suspect in the living room. The officer in the living room told the young man he "felt" he was involved in the burglary. The young man acknowledged being at the scene. At the outset of the interrogation at the police station, the suspect was given *Miranda* warnings and made a full confession. The Court held the second statement admissible and voluntary and rejected the "cat out of the bag" theory that any short, earlier admission obtained in arguably innocent neglect of Miranda determined the character of the later, warned confession. *Id.* at 311-14.

suspect's situation would understand the import and effect of the *Miranda* warning," such as "a substantial break in time and circumstances between the pre-warning statement and the *Miranda* warning," or "an additional warning that explains the likely inadmissibility of the prewarning custodial statement." *Id.*

Justice O'Connor authored the four-member dissent, which concluded that "the plurality gives insufficient deference to *Elstad*," and stated that the Court should have "analyze[d] the two-step interrogation procedure under the voluntariness standards central to the Fifth Amendment and reiterated in *Elstad*." *Id.* at 628-29 (O'Connor, J., dissenting).

B. The Holding Under *Seibert*

Under *Miranda*, police officers are required to inform individuals about to undergo custodial interrogation that the state intends to use their statements to convict them, that they have the right to remain silent, and that they have the right to have counsel present during questioning. *Miranda*, 384 U.S. at 468-70. An individual may effectively waive these rights "provided the waiver is made voluntarily, knowingly, and intelligently." *Id.* at 444, 475. In order for the waiver to be made voluntarily, it "must have been made with a full awareness of the nature of the right being abandoned and the consequences of the decision to abandon it." *Moran v. Burbine*, 475 U.S. 412, 421 (1986).

Our reading of *Seibert* is that a confession is voluntarily made if it is made after proper and functional *Miranda* warnings. *See Seibert*, 542 U.S. at 612 (plurality opinion). *Seibert* deals with the admissibility of statements made after the police give "midstream" warnings, that is, when police begin a custodial interrogation without advising the suspect of his *Miranda* rights, obtain incriminating statements, and then continue questioning after administering warnings in order to re-elicit the incriminating statements. *Id.* The plurality opinion holds that "when interrogators question first and warn later," the threshold issue is "whether it would be reasonable to find that in these circumstances the warnings could function 'effectively' as *Miranda* requires." *Id.* at 611-12.

The dissent aptly points out that the holding of a plurality decision is usually found in the opinion that concurs in the judgment on the narrowest grounds. *Marks v. United States*, 430 U.S. 188, 193 (1977) (holding that ordinarily, where "a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgements on the narrowest grounds." (internal quotation marks omitted)); *see also Thornton v. State*, 145 S.W.3d 228, 234 n.10 (Tex. Crim. App. 2004).

However, the dissent fails to recognize the practical limitations of *Marks*. The *Marks* rule produces a determinate holding only when one opinion is a

logical subset of other, broader opinions. *United States v. Eckford*, 910 F.2d 216, 219 n.8 (5th Cir. 1990) ("The *Marks* 'narrowest grounds' interpretation of plurality decisions comprehends a least common denominator upon which all of the justices of the majority can agree."); *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc). When the plurality and concurring opinions take distinct approaches, and there is no narrowest opinion representing the common denominator of the Court's reasoning, *Marks* becomes problematic. *United States v. Carrizales-Toledo*, 454 F.3d 1142, 1151 (10th Cir. 2006). *Marks* does not apply when the various opinions supporting the Court's decision are mutually exclusive. *See Homeward Bound, Inc. v. Hissom Mem'l Ctr.*, 963 F.2d 1352, 1359 (10th Cir. 1992) (*citing King*, 950 F.2d at 782).

We find the holding in *Seibert* to be in the plurality opinion for two reasons. First, there is no internal rule tethering the plurality and concurrence in judgment. *See* Ken Kimura, *A Legitimacy Model for the Interpretation of Plurality Decisions*, 77 Cornell L. Rev. 1593, 1599-1600 (1992).[3] The plurality's rationale

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[3] Ascertaining the appropriate legal rule requires a close analysis of the plurality opinion and Justice Kennedy's concurring opinion. For,

> [a]lthough the narrower legal rule may share certain aspects of the broader legal rule, it does not necessarily follow that the Justices supporting the broader rule accept the validity of the narrower rule. Indeed, the fact that the decision creates a split concurrence suggests that some Justices do not accept the validity of

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focuses on the defendant's comprehension of his rights during the interrogation process. *Seibert*, 542 U.S. at 613-14 ([W]hen *Miranda* warnings are inserted in the midst of coordinated and continuing interrogation, they are likely to mislead and 'depriv[e] a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them.'") (quoting *Moran v. Burbine*, 475 U.S. 412, 424 (1986)). The plurality's reasoning fits within the framework surrounding *Miranda*. *See Duckworth v. Eagan*, 492 U.S. 195, 203 (1989); *California v. Prysock*, 453 U.S. 355, 359 (1981). By contrast, Justice Kennedy's concurrence focuses on the state-of-mind of the interrogating officers, drawing a distinctions between accidental and intentional actions. It urges the application of

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> the narrower rule. To construe the narrower legal rule as the majority rule is misguided. It is true that the coalition of Justices supporting the broader rule would necessarily reach the same outcome under the narrower rule. This seems to suggest that this coalition implicitly accepts the narrower rule. However, in future decisions, the coalition supporting the broader rule will "implicitly" agree with the narrower rule only on those occasions when the same particular outcome is achieved. When the alternative outcome results, no basis exists for believing that the Justices supporting the broader rule will still accept the principles underlying the narrower rule. This one-way flow of legitimacy disallows imputing a majority agreement on the narrower rule.

Ken Kimura, A Legitimacy Model for the Interpretation of Plurality Decisions, 77 Cornell L. Rev., 1593, 1604 (1992).

Elstad unless a deliberate two-step strategy is used; if the deliberate two-step strategy is used, curative measures must be employed before the postwarning statement is made in order for that statement to be admissible. *Seibert*, 542 U.S. at 621 (Kennedy, J., concurring in judgment only).

Furthermore, not only was *Seibert's* concurrence the decision of only one (or arguably two) Justice(s), but it was expressly rejected by seven other Justices of the Supreme Court.[4] The plurality argued that, "[b]ecause intent of the officer will rarely be as candidly admitted as it was here (even as it is likely to determine the conduct of the interrogation), the focus is on facts apart from the intent that show the question first tactic at work." *Id.* at 617 n.6. Justice O'Connor's rebuff is even more stinging. Justice O'Connor claimed that Justice Kennedy's rationale creates ambiguity in analyzing two-stage interrogation cases because, "in addition to addressing the standard *Miranda* and voluntariness questions, courts will be forced to conduct the kind of difficult, state-of-mind inquiry that we normally take pains to avoid." *Id.* at 627 (O'Connor, J., dissenting).

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[4] Justice Breyer joined in Justice Souter's plurality entirely; he also wrote his own concurrence that partially joins Justice Kenney's concurrence, but articulates a slightly different rule in that, "[c]ourts should exclude the 'fruits' of the initial unwarned questioning unless the failure to warn was in good faith." *Seibert*, 542 U.S. at 617 (Breyer, J., concurring).

The underlying rationales of Justice Kennedy's concurrence and the plurality opinion are so divergent that they render *Marks's* narrowest-grounds-interpretation rule inapplicable. Generally, the narrowest ground merits only persuasive precedential value, Kimura, 77 Cornell L. Rev. at 1617, not mandatory precedential value. Because Justice Kennedy's concurrence is clearly a minority view and does not comport with the jurisprudence surrounding *Miranda*, we find the plurality opinion is more persuasive and therefore governs.[5]

C. Response to the Dissent

In applying Justice Kennedy's holding, the dissent summarily finds deliberate two-stage intent in either a failure to make a record of pre-*Miranda* statements or the very act of engaging in "two-stage" interrogation. The dissent fails to perform an *Elstad* analysis of whether the officer's omission of *Miranda* warnings was "a simple failure to administer the warning, unaccompanied by any actual coercion or

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[5] We are mindful that the U.S. Court of Appeals for the Fifth Circuit has recently issued two unpublished opinions finding Seibert's holding in Justice Kennedy's concurrence. *See, e.g., United States v. Courtney*, No. 05-30156, 2006 U.S. LEXIS 21965, at *11 (5th Cir. Aug. 20, 2006) (unpublished opinion) United *States v. Hernandez*, No. 05-20158, 2006 U.S. App. LEXIS 23250, at *7, n.1 (5th Cir. Sept. 12, 2006) (per curium) (unpublished opinion). Perhaps the Fifth Circuit can find an internal rule coursing through the plurality and Justice Kennedy's concurrence that we cannot.

other circumstances calculated to undermine the suspect's ability to exercise his free will." *Elstad*, 470 U.S. at 318, n.5. The dissent's inability to successfully conduct an *Elstad* inquiry exposes the practical problems of applying the rule dictated by Justice Kenney's concurrence in *Seibert*. As noted in Justice O'Connor's dissent, evidentiary difficulties have led the Supreme Court to reject an intent-based test in several criminal procedures. *Seibert*, 542 U.S. 626. (*citing New York v. Quarles*, 467 U.S. 649 (1984). Unlike *Seibert*, Officer Sosa did not own up to a deliberate two-stage interrogation. The silent record in the instant case does not reveal any actual coercion or other circumstances calculated to undermine" Martinez's ability to exercise his free will.

The dissent cites *Jones v. State*, 119 S.W.3d 766 (Tex. Crim. App. 2003), as authority condemning two-stage interrogation. *Jones* was published a year before *Seibert* was decided, dealt with facts equally as disturbing as *Seibert*, and is distinguishable from Martinez's case. In *Jones*, appellant orally admitted his involvement in two murders. *Id.* at 771-72. As appellant confessed, an officer wrote down "verbatim" what appellant said on a statement form. *Id.* When appellant finished, the officer sat down next to him and went over the legal rights that appeared at the top of the written form. *Id.* Then the officer and appellant read the statement together, appellant corrected mistakes, initialed revisions, and signed the statement at the bottom. *Id.*

The dissent's reliance on *Jones* is misplaced. The facts in Jones were so egregious that the Court of Criminal Appeals rested its opinion on *Miranda*. It refused to apply *Elstad* – the only other doctrinal tool available at the time – because "[t]o apply *Elstad* here and declare the [appellant's] statement admissible by virtue of the late admonishment of the required warnings would undermine the spirit and intent of *Miranda*." *Id.* at 775. *Seibert* is now the law of the land and provides an appropriate analysis given the facts of the instant case. Martinez's rights were not trampled like those of the appellant in *Jones*. The instant case shows a meaningful waiver of *Miranda* because the questioning was not continuous. To the contrary, the officers' questions were punctuated by a trip to a municipal court, where Martinez was given *Miranda* warnings by a magistrate.

D. Standard of Review

Motions to suppress are subject to a bifurcated standard of review. *Carmouche v. State*, 10 S.W.3d 323, 327 (Tex. Crim. App. 2000). In reviewing the trial court's ruling on a motion to suppress, we afford deference to the trial court's determination of the historical facts and rulings on mixed questions of law and fact if the resolution of those questions turns upon the credibility and demeanor of witnesses. *Guzman v. State*, 955 S.W.2d 85, 87-88 (Tex. Crim. App. 1997); *Morfin v. State*, 34 S.W.3d 664, 666 (Tex. App. – San Antonio 2000, no pet.). Appellate courts are not at liberty to disturb the trial court's findings of fact as long as they are supported by the record.

However, we decide *de novo* whether the trial court erred in misapplying the law to the facts. *Carmouche*, 10 S.W.3d at 327; *Guzman*, 955 S.W.2d at 87-88; *Morfin*, 34 S.W.3d at 666.

E. Analysis

The instant case presents a *Seibert* problem because Martinez made pre-*Miranda* statements to police officers and a polygraph examiner, was then given separate *Miranda* warnings by a magistrate and the interrogating officers, and finally appeared in a videotaped interrogation that was admitted into evidence at trial.

At the outset, we note that there is no record of Martinez's pre-warning statements made to Officers Sosa and Hernandez or the polygraph examiner. The first two factors that the *Seibert* plurality found relevant in determining whether *Miranda* warnings delivered midstream are effective are the completeness and detail of the questions and answers in the first round of interrogation and the overlapping content of the two statements. The people were shot during the incident. Unlike *Seibert*, Martinez was repeating the polygrapher's general statements regarding the crime, not his own unwarned statements. Therefore, the first two *Seibert* factors are not applicable in Martinez's case.

In this case, the last three *Seibert* factors point toward a meaningful waiver of Martinez's right to remain silent. The timing, setting, and general circumstances surrounding the second interrogation

were formal enough to apprise Martinez of the gravity of the situation. Shortly after the polygraph test was administered, Martinez was given *Miranda* warnings by a magistrate and then taken to a different police station for further interrogation. Before the post-warning interrogation, Martinez was apprised of his rights by Officer Sosa. Having been given *Miranda* warnings by a magistrate and Officer Sosa, Martinez made the videotaped statement. While Officers Sosa and Hernandez interacted with Martinez before and after the *Miranda* warnings, their questions did not rely on statements made prior to the warnings.

III. CONCLUSION

We conclude that admission of the videotaped statement did not constitute constitutional error because it was made after a proper and functional *Miranda* warning. Martinez's sole point of error is overruled. The judgment of the trial court is affirmed.

/s/ Rogelio Valdez
ROGELIO VALDEZ
Chief Justice

Dissenting opinion by Justice Linda Reyna Yañez.

Publish.
TEX. R. APP. P. 47.2(b).

Opinion delivered and filed
this the 9th day of November, 2006.

DISSENTING OPINION

Before Chief Justice Valdez and Justices Yañez and Castillo Dissenting Opinion by Justice Yañez

I agree with the majority that the United States Supreme Court's decision in *Missouri v. Seibert* is applicable to this case.[1] I disagree, however, with the majority's application of *Seibert* and its conclusion that the trial court did not err in admitting appellant's videotaped statement. I would hold that appellant's statement was obtained pursuant to a deliberate two-step interrogation technique used to undermine the effectiveness of *Miranda* warnings,[2] and that the statement is therefore inadmissible. Because I cannot conclude beyond a reasonable doubt that the statement did not contribute to appellant's conviction, I would also hold that the error was harmful.[3] I would sustain appellant's issue, reverse his conviction, and remand to the trial court for a new trial. Accordingly, I respectfully dissent.

In a single issue, appellant contends the trial court erred in admitting his post-*Miranda* videotaped statement because his "initial interrogation," prior to receiving *Miranda* warnings, tainted his warned statement and rendered it involuntary. Appellant

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[1] *Missouri v. Seibert*, 542 U.S. 600, 616-17 (2004).

[2] *Miranda v. Arizona*, 384 U.S. 436, 479 (1966).

[3] *See* TEX. R. APP. P. 44.2(a).

contends he was subjected to an "unwarned interrogation process, including . . . polygraphing," which was used to obtain admissions from him before he was apprised of his rights. Appellant argues that the warned and unwarned portions of his interviews were "part of one continuous process," and that his warned statement was therefore involuntary and inadmissible.

In response, the State argues that (1) appellant was not interrogated and gave no incriminating statement prior to waiving his constitutional rights, and (2) the admission of appellant's statement was harmless in light of other evidence of his guilt. I conclude that by subjecting appellant to a polygraph examination that included questions about the crime for which he was arrested, without first giving him *Miranda* warnings, law enforcement officers deliberately utilized a two-step interrogation technique that undermined appellant's subsequent *Miranda* warnings and rendered his videotaped statement inadmissible.

Standard of Review and Applicable Law

A trial court's ruling on a motion to suppress is generally reviewed for abuse of discretion.[4] In a suppression hearing, the trial judge is the sole trier of

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[4] *See Ford v. State*, 26 S.W.3d 669, 672 (Tex. App. – Corpus Christi 2000, no pet.) (citing *Oles v. State*, 933 S.W.2d 103, 106 (Tex. Crim. App. 1999)).

fact and judge of the credibility of the witnesses and the weight to be given to their testimony.[5] In reviewing a trial court's ruling on a motion to suppress, we afford almost total deference to the trial court's determination of the historical facts that the record supports, especially when the trial court's findings turn on evaluating a witness's credibility and demeanor.[6] When, as in this case, the trial court makes no explicit findings of historical fact, we presume it made those findings necessary to support its ruling, provided they are supported in the record.[7] We afford

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[5] *State v. Ballard*, 987 S.W.2d 889, 891 (Tex. Crim. App. 1999).

[6] *State v. Ross*, 32 S.W.3d 853, 856 (Tex. Crim. App. 2000); *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997).

[7] *See Carmouche v. State*, 10 S.W.3d 323, 327-28 (Tex. Crim. App. 2000). The trial court did not file written fact findings and conclusions of law regarding the voluntariness of appellant's statement as required by article 38.22, section 6 of the code of criminal procedure. *See* TEX. CODE CRIM. PROC. ANN. art. 38.22 § 6 (Vernon 2005); *Urias v. State*, 155 S.W.3d 141, 143 (Tex. Crim. App. 2004). However, the trial court complied with article 38.22, section 6, by dictating its findings and conclusions to the court reporter, and those findings are part of the appellate record. *See Murphy v. State*, 112 S.W.3d 592, 601 (Tex. Crim. App. 2003). The trial court's findings were:

> I am going to admit the statement. I make a specific finding I have found Officer Sosa to be a credible witness. The arrest warrant is a good arrest warrant. It appeared that the defendant did freely, voluntarily and knowingly waive his rights to remain silent and give that statement. There was no testimony of any threats. The behavior of Officer Sosa appears to be exemplary and it is admitted.

almost total deference to the trial court's ruling on "application of law to fact questions," also known as "mixed questions of law and fact," if resolving those ultimate questions turns on evaluating credibility and demeanor.[8] We review *de novo* questions of law and "mixed questions of law and fact" that do not turn on an evaluation of credibility and demeanor.[9] We uphold a trial court's ruling on a suppression motion if it is reasonably supported by the record and is correct on any theory of law applicable to the case.[10]

The safeguards established in *Miranda* come into play when a person in custody is subjected to either express questioning or its functional equivalent.[11] A confession may be deemed "involuntary" under three different theories: (1) failure to comply with article 38.22;[12] (2) failure to comply with the dictates of *Miranda*; or (3) failure to comply with due process or due course of law because the confession was not freely given as a result of coercion, improper influences, or incompetency.[13] When a defendant challenges the

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[8] *Ross*, 32 S.W.3d at 856; *Guzman*, 955 S.W.2d at 89.

[9] *Ross*, 32 S.W.3d at 856; *Guzman*, 955 S.W.2d at 89.

[10] *Villarreal v. State*, 935 S.W.2d 134, 138 (Tex. Crim. App. 1996).

[11] *Miller v. State*, 196 S.W.3d 256, 266 (Tex. App. – Fort Worth 2006, no pet. h.) (citing *Rhode Island v. Innis*, 466 U.S. 291, 300 (1980)).

[12] See TEX. CODE CRIM. PROC. art. 38.22 (Vernon 2005).

[13] *Miller*, 196 S.W.3d at 266 (citing *Wolfe v. State*, 917 S.W.2d 270, 282 (Tex. Crim. App. 1996)).

voluntariness of a confession, the burden is on the government to show that a waiver of *Miranda* rights was the result of a defendant's own free and rational choice in the totality of the circumstances.[14]

The Texas Court of Criminal Appeals has held that a trial court's erroneous admission of a defendant's statement in violation of the Fifth Amendment is federal constitutional error subject to a harm analysis under Texas Rule of Appellate Procedure 44.2(a).[15] Under rule 44.2(a), a judgment of conviction or punishment must be reversed unless the reviewing court determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment.[16] Error in admitting an appellant's statement is not harmless beyond a reasonable doubt if there is a reasonable likelihood that the error materially affected the jury's deliberations.[17] Thus, a reviewing court should "calculate, as nearly as possible, the

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[14] *United States v. Hernandez*, No. 05-20158, 2006 U.S. App. LEXIS 23258, at *12 (5th Cir. Sept. 12, 2006) (per curiam) (citing *Colorado v. Connelly*, 479 U.S. 157, 163-65 (1986); *United States v. Bell*, 367 F.3d 452, 461 (5th Cir. 2004)); *Miller*, 196 S.W.3d at 266 (citing *Alvarado v. State*, 912 S.W.2d 199, 211 (Tex. Crim. App. 1995)).

[15] *See* TEX. R. APP. PROC. 44.2(a); *Jones v. State*, 119 S.W.3d 766, 777 (Tex. Crim. App. 2003); *McCarthy v. State*, 65 S.W.3d 47, 55 (Tex. Crim. App. 2001); *Valerio v. State*, No. 13-03-243-CR, 2004 Tex App. LEXIS 11049, at *10-*11 (Tex. App. – Corpus Christi 2004, pet. ref'd) (not designated for publication).

[16] *Jones*, 119 S.W.3d at 777; *McCarthy*, 65 S.W.3d at 52.

[17] *Jones*, 119 S.W.3d at 777; *McCarthy*, 65 S.W.3d at 55.

probable impact of the error on the jury in light of the other evidence."[18]

Analysis

Appellant argues that his post-*Miranda* statement is inadmissible because his unwarned and warned statements were "one continuous process." Appellant cites *Jones v. State*, 119 S.W.3d 766, 775 (Tex. Crim. App. 2003) and *Missouri v. Seibert*, 542 U.S. 600, 616-17 (2004), in support of his argument.[19]

The majority applies the multi-factor test crafted by the four-justice plurality in *Seibert* and concludes that under the circumstances, appellant's pre-statement *Miranda* warnings effectively apprised him

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[18] *Jones*, 119 S.W.3d at 777 (quoting *McCarthy*, 65 S.W.3d at 55); *see United States v. Polanco*, 93 F.3d 555, 562-63 (9th Cir. 1996) (analyzing *Miranda-Elstad* error and finding it harmless because of "substantial other evidence" to prove the same fact as that contained within the defendant's improperly admitted statement); *Harryman v. Estelle*, 616 F.2d 870, 876 (5th Cir. 1980) (when determining whether admission of non-*Mirandized* statements is harmless, reviewing court must decide whether, absent that statement, the evidence remains not only sufficient to support the verdict but so overwhelming as to establish the guilt of the accused beyond a reasonable doubt; error harmless because other physical evidence was overwhelming).

[19] Appellant's brief was filed June 21, 2004, approximately one week before the U.S. Supreme Court issued its opinion in *Missouri v. Seibert*, 542 U.S. 600 (2004). Appellant cites the opinion of the Missouri Supreme Court, *State v. Seibert*, 93 S.W.3d 700 (Mo. 2000), which was affirmed by the U.S. Supreme Court.

of his rights and rendered his statement admissible.[20] As noted, I agree that *Seibert* is applicable, but disagree with the majority's application of *Seibert* and its conclusion. Under the holding in *Seibert*, the threshold issue is whether the officers deliberately engaged in a two-step procedure to weaken *Miranda's* protections.[21] By subjecting appellant to a polygraph

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[20] *See Seibert*, 542 U.S. at 615.

[21] *See id.* at 621-22 (Kennedy, J., concurring). The multi-factor test crafted by the four-justice plurality does not represent the holding in *Seibert*. The holding of *Seibert* is found in Justice Kennedy's concurrence. *See Hernandez*, 2006 U.S. App. LEXIS 23258, at *7 n.1 (citing *Marks v. United States*, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.")); *United States v. Courtney*, 463 F.3d 333, 338 (5th Cir. 2006); *United States v. Williams*, 435 F.3d 1148, 1157 (9th Cir, 2006); *United States v. Naranjo*, 426 F.3d 221, 231 (3rd Cir. 2005). Thus, the holding in *Seibert* is that a trial court must suppress post-warning confessions obtained during a *deliberate* two-step interrogation where the midstream *Miranda* warning – in light of the objective facts and circumstances – did not effectively apprise the suspect of his rights. *Seibert*, 542 U.S. at 621-22 (Kennedy, J., concurring). Although the *Seibert* plurality would consider all two-stage interrogations eligible for a *Seibert* inquiry, Justice Kennedy's opinion narrowed the *Seibert* exception to those cases involving deliberate use of the two-step procedure to weaken *Miranda's* protections. *See Id.*; *Williams*, 435 F.3d at 1157. Although the majority in the present case recognizes the Fifth Circuit authority cited above, it nonetheless finds the interpretation rule cited in *Marks* "inapplicable." The majority cites authority from the Tenth Circuit in support of its position. *See United States v. Carrizales-Toledo*, 454 F.3d 1142, 1151 (10th Cir. 2006).

examination that included questions about the crime for which he was arrested, without the benefit of *Miranda* warnings, the officers deliberately used a two-step interrogation technique to undermine the protections of *Miranda*.

In *Jones*, a Texas Ranger questioned the appellant, while in custody for one offense, about two extraneous murders.[22] After the appellant orally admitted his involvement in the murders, the officer wrote down "verbatim" what the appellant said, during an interview that lasted approximately an hour-and-a-half, postponing *Miranda* warnings until he asked the appellant to sign the written statement.[23] The court of criminal appeals held that the circumstances reflected "a serious misunderstanding by law enforcement" of the requirements of *Miranda*.[24] The court found that the unwarned oral statement and the written warned statement were given during a nearly undifferentiated single event, taking place in the same room as an uninterrupted and continuous process."[25] The court held that to declare the statement admissible by virtue of the late warnings "would undermine the spirit and intent of *Miranda*."[26]

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[22] *Jones*, 119 S.W.3d at 771.

[23] *Id.* at 771-72.

[24] *Id.* at 774.

[25] *Id.* at 775.

[26] *Id.*

In *Seibert*, the United States Supreme Court addressed a "question-first" interrogation strategy, by which officers intentionally questioned a person under arrest without giving *Miranda* warnings until the suspect confessed, then gave the warnings and repeated the questioning to get the same incriminating response.[27] Justice Kennedy, concurring with a plurality of four other justices, held that a post-*Miranda* statement given after pre-*Miranda* statements, should be judged under the standard laid out in *Oregon v. Elstad*, 470 U.S. 298, 314 (1985),[28] unless the withholding of *Miranda* warnings was a deliberate strategy on the part of law enforcement officials to circumvent the protections of *Miranda*.[29] Justice Kennedy narrowed the *Seibert* test to two parts.[30] First, a court must decide whether the officers made a "deliberate" choice to flout *Miranda* in the first round of interrogation.[31] If so, "postwarning statements that are related to the substance of prewarning statements must be excluded unless curative measures are taken before the postwarning statement is

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[27] *Seibert*, 542 U.S. at 616-17.

[28] *See Oregon v. Elstad*, 470 U.S. 298, 314 (1985). In *Elstad*, the Supreme Court held that "absent deliberately coercive or improper tactics," "[a] subsequent administration of *Miranda* warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the earlier statement." *Id.*

[29] *Seibert*, 542 U.S. at 621-22 (Kennedy, J., concurring).

[30] *Id.* at 622; *see also Courtney*, 463 F.3d at 338-39.

[31] *Seibert*, 542 U.S. at 622 (Kennedy, J., concurring).

made."[32] Such "curative measures" include, for example, a sufficient break in time or circumstances between interrogations, or a warning to the suspect that the first statement cannot be used against him.[33]

Appellant argues that "[a]s in *Jones* and *Seibert*, the unwarned and warned portions of the interviews with [him] here were done as part of one continuous process."

The only witness at the hearing on appellant's motion to suppress was Macario Sosa, the Houston police officer who arrested appellant. Officer Sosa testified that pursuant to a Crime Stoppers tip, appellant was identified as a suspect in the robbery that resulted in the murder of Manuel Arriaga-Molina, one of the victims. Two of the surviving victims, Gustavo Lopez Camilo and Alfredo Loredo Balderas, identified appellant as a participant in the crime from a photo array. Officer Sosa obtained an arrest warrant And arrested appellant about 10:30 a.m. The officer told appellant why he was being arrested, and appellant denied knowing anything about the situation. Officer Sosa transported appellant to police headquarters and asked him if he was willing to take a polygraph examination. Officer Sosa did not provide *Miranda* warnings to appellant. Officer Sosa provided the case file to the polygraph examiner, who then prepared the questions. Appellant was taken

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[32] *Id.*

[33] *Id.*

to a "polygraph room" in the same building (police headquarters) for a polygraph examination. Officer Sosa testified that the polygraph procedure, including preparation of the questions and the examination itself, took three to four hours. After the examination, Officer Sosa was advised that the polygraph results showed "deception" on appellant's answers to some questions. Officer Sosa confronted appellant with the polygraph results. Appellant was then taken before a magistrate at municipal court (at a separate location) around 5:00 p.m , and was advised of his *Miranda* rights. Immediately thereafter, appellant was taken to a "central hold area," at a separate location, where he gave his videotaped statement.

On cross-examination, defendant's counsel asked Officer Sosa if he recalled the questions appellant was asked during the polygraph examination that "supposedly reflected deception." Officer Sosa responded that he did not. Defense counsel questioned Officer Sosa about appellant's reaction when he was told that he "failed" the polygraph examination. Officer Sosa stated that he did not recall.

At the suppression hearing, Officer Sosa testified as follows:

> Q [by defense counsel]: Now, on the tape we heard some references to yeah, that's what they told me, or, yeah, that's what that guy said, with reference to like the number of shots. Who would "they" have been when he's pointing to the wall there?

A [Officer Sosa]: The polygraph examiner.

Q: So the polygraph examiner gives the person information as they're asking questions about the offense; is that correct?

A: I wasn't present so I can't tell you exactly what happened during the examination.

Q: So you can't say for sure that the polygrapher did not provide him with details of the offense in order to ask him questions?

A: I can't say whether he provided details and *Miranda* warnings, what have you, no, ma'am.

Q: Because you have nothing to do with that?

A: I was not present during t' at time.

We have reviewed appellant's videotaped statement. The tape shows appellant responding to questions posed by Officers Sosa and Hernandez. During the interrogation, there are two instances in which appellant refers to information about the circumstances of the crime apparently provided by others.[34]

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[34] At one point, regarding information that three people were shot and one died, appellant stated, "that's what they told me over there." Later, appellant made a similar reference that "he told me only three people got shot." Similarly, at trial, Officer Sosa testified that in appellant's statement, when he stated, "that's what they told me, three shots," and pointed to the wall, appellant was referring to another officer.

Officer Sosa testified that appellant was referring to statements or questions provided by the polygraph examiner.

The record contains no documentation regarding the polygraph examination. Officer Sosa stated that he did not know whether appellant was given *Miranda* warnings prior to being questioned by the polygraph examiner. He also stated that he did not recall the identity of the polygraph examiner. At the suppression hearing, appellant's counsel argued that "the lack, most importantly, of any reading of rights or *Miranda* warnings during all the questioning that occurred throughout the day by the polygraph examiner" tainted appellant's post-warning statement. The burden at the suppression hearing was on the State to prove by a preponderance of the evidence that appellant's statement was voluntarily given.[35] Here, the record shows that Officer Sosa provided the polygraph examiner with the case file, which clearly enabled the examiner to question appellant about the specifics of the crime for which he had been arrested. By doing so, without ensuring that appellant was provided *Miranda* warnings prior to being questioned, I conclude that the officers deliberately engaged in an unconstitutional two-step interrogation strategy designed to undermine the protections of

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[35] *Miller*, 196 S.W.3d at 266 (citing *Alvarado*, 912 S.W.2d at 211).

Miranda. Accordingly, I conclude that the admissibility of appellant's statement is governed by *Seibert*.[36]

In his postwarning statement, appellant refers to circumstances of the crime discussed during his unwarned interview with the polygraph examiner. Thus, appellant's postwarning statement was "related to the substance of [his] prewarning statements" and must be "excluded absent specific, curative steps."[37] With regard to whether a "substantial break in time and circumstances" occurred, sufficient to allow appellant to "distinguish the two contexts and appreciate that the interrogation has taken a new turn,"[38] I note that appellant was moved to three different locations throughout the afternoon: the polygraph examination was taken at one location, he was then taken before a magistrate at a different location, and his statement was taken at a third location. However, very little time elapsed between these events. Officer Sosa testified that "[o]nce we found that there was an area of deception on the polygraph, we gathered our things or I collected [the appellant], we gathered our things and he was taken to a magistrate."[39] He also testified that "[a]fter the magistrate's warning was read, we proceeded to the central hold area at 61 Riesner, which is where the statement was taken."[40]

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[36] *Seibert*, 542 U.S. at 622 (Kennedy, J., concurring).

[37] *Id.* at 621.

[38] *Id.* at 622.

[39] Appellant was taken before a magistrate around 4:50 p.m.

[40] Appellant's videotaped statement started at 5:16 p.m.

Although the changes in location may have "distinguished" the contexts for appellant, there was no substantial break in time and no evidence that appellant was told that his pre-warned statements to the polygraph examiner were likely inadmissible.[41] I conclude that under the holding in *Seibert*, appellant's postwarning statement is inadmissible.

Harm Analysis

I next examine whether there is a reasonable likelihood that the admission of appellant's videotaped statement materially affected the jury's deliberations.[42] A reviewing court "should calculate, as nearly as possible, the probable impact of the error on the jury in light of the other evidence."[43]

Here, the two surviving victims identified appellant from a photo array as one of the two assailants involved in the robbery and murder. In appellant's statement, he gave several versions of events regarding the incident, changing his story as to whether three or four people were involved and who was driving. However, in each version, appellant stated that he was in the back seat of the car, did not get out

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[41] *Seibert*, 542 U.S. at 622 (Kennedy, J., concurring).

[42] *McCarthy*, 65 S.W.3d at 55 ("If there is a reasonable likelihood that the error materially affected the jury's deliberations, then the error is not harmless beyond a reasonable doubt.").

[43] *Id.*

of the car during the incident, and did not personally shoot anyone. In his statement, appellant states he was in the back seat as a "lookout." He also states in his statement that he knew the other people in the car were going to "do a lick," or commit a robbery.

As the court of criminal appeals noted in *McCarthy*,

> A defendant's statement, especially a statement implicating her in the commission of the charged offense, is unlike any other evidence that can be admitted against the defendant. *See Fulminante v. Arizona*, 499 U.S. 279, 296, 113 L. Ed. 2d 302, 111 S. Ct. 1246 (1991). In *Fulminante*, the defendant was convicted through the use of a statement obtained in violation of his Fifth and Fourteenth Amendment rights. *See id.* at 287-88. The Supreme Court noted that
>
> > [A] defendant's own confession is probably the most probative and damaging evidence that can be admitted against him. The admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct. Certainly, confessions have profound impact on the jury, so much so that we may justifiably doubt its ability

> to put them out of mind even if told to do so.[44]

Here, just as in *McCarthy*, appellant's statement was sufficient to establish his guilt as a party.[45] In closing argument, the prosecutor emphasized appellant's statement:

> [Prosecutor]: The fourth way [of four ways to find appellant guilty of capital murder] is as a party, as a lookout to that capital murder, again, promote, assist in the commission of the offense, he solicits, encouraged, directed or aided. If you believe this defendant's statement, you take everything he says as true, says it here twice on this tape: I was a lookout. I was sitting in the car, looking around, knowing that these guys were going to get a lick. You're a lookout and you're guilty of capital murder.
>
> . . . .
>
> I watched that tape and you've got it in evidence and I counted at least seven times where the defendant in that particular tape says he's either a lookout or he's watching out.
>
> . . . .

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[44] *Id.* at 55-56 (quoting *Fulminante v. Arizona*, 499 U.S. 279, 296 (1991)).

[45] The jury charge instructed the jury on the law of parties and the law of conspiracy.

> But if you believe what he says in that statement, he's guilty of capital murder.

Thus, as in *McCarthy*, the State used appellant's statement as direct evidence of his guilt as a party or co-conspirator.[46] As the *McCarthy* court noted,

> A confession is likely to leave an indelible impact on a jury. "If the jury believes that a defendant has admitted the crime, it will doubtless be tempted to rest its decision on that evidence alone, without careful consideration of the other evidence in the case. Apart, perhaps, from a videotape of the crime, one would have difficulty finding evidence more damaging to a criminal defendant's plea of innocence."[47]

I also note that during its deliberations, the jury requested appellant's videotaped statement, among other items. I find that it is impossible to say there is no reasonable likelihood that the State's use of appellant's statement materially affected the jury's deliberations.[48] I cannot conclude, beyond a reasonable doubt, that the admission of appellant's unconstitutionally obtained statement did not contribute to the jury's verdict of guilty.[49] Accordingly, I would sustain

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[46] *See McCarthy*, 65 S.W.3d at 54.

[47] *Id.* at 56 (quoting *Fulminante*, 499 U.S. at 313 (Kennedy, J., concurring)).

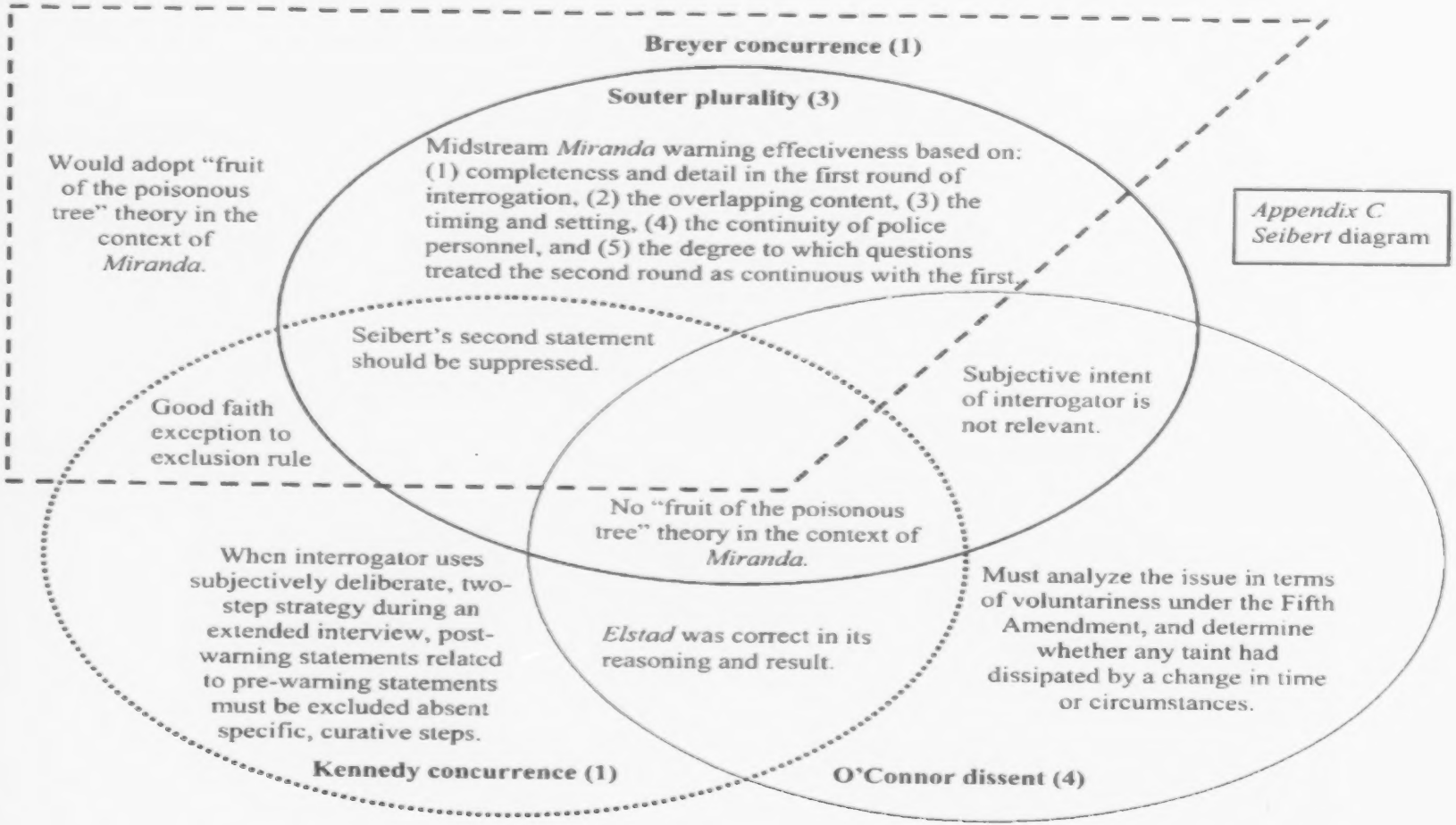
[48] *See id.*

[49] *See id.*

appellant's issue, reverse the judgment of the trial court, and remand for a new trial.

/s/ Linda Reyna Yanez
LINDA REYNA YAÑEZ
Justice

Do not publish. TEX. R. APP. P. 47.2(b).
Dissenting opinion delivered and filed
this the 9th day of November, 2006.


Breyer concurrence (1)
Souter plurality (3)
Would adopt "fruit of the poisonous tree" theory in the context of *Miranda*.
Midstream *Miranda* warning effectiveness based on: (1) completeness and detail in the first round of interrogation, (2) the overlapping content, (3) the timing and setting, (4) the continuity of police personnel, and (5) the degree to which questions treated the second round as continuous with the first.
Appendix C
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Seibert's second statement should be suppressed.
Subjective intent of interrogator is not relevant.
Good faith exception to exclusion rule
No "fruit of the poisonous tree" theory in the context of *Miranda*.
When interrogator uses subjectively deliberate, two-step strategy during an extended interview, post-warning statements related to pre-warning statements must be excluded absent specific, curative steps.
Elstad was correct in its reasoning and result.
Must analyze the issue in terms of voluntariness under the Fifth Amendment, and determine whether any taint had dissipated by a change in time or circumstances.
Kennedy concurrence (1)
O'Connor dissent (4)

(2)

No. 08-1159

IN THE
SUPREME COURT OF THE UNITED STATES

The State of Texas,

Petitioner

v.

Raul Adam Martinez, Jr.,

Respondent.

On Petition for a Writ of Certiorari
To the Texas Court of Criminal Appeals

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Prior to this Court's decision in *Missouri v. Seibert*, 542 U.S. 600 (2004), it was a common practice in some police departments to interrogate suspects according to a "question-first" strategy, under which officers would interrogate suspects without administering *Miranda* warnings and then, after obtaining an incriminating statement, *Mirandize* the suspects and get them to repeat the same information. *Seibert* held that the Fifth Amendment requires the suppression of confessions obtained pursuant to such a deliberate strategy to evade *Miranda*.

This case arises from a question-first interrogation conducted before *Seibert* was decided. On appeal, after *Seibert* was announced, the Texas Court of Criminal Appeals held that the interrogation violated the Fifth Amendment. The State of Texas seeks certiorari challenging that result.

1. On the morning of November 18, 2003, Officer Macario Sosa arrested respondent Raul Martinez in a convenience store parking lot, pursuant to a warrant issued in connection with a robbery and murder. Pet. App. 4. Despite knowing that this arrest placed respondent "in custody" for purposes of this Court's decision in *Miranda v. Arizona*, 384 U.S. 436 (1966), Officer Sosa did not give *Miranda* warnings at this time. *Id.*; *see also* Tr. of Proceedings at 38-39, *State v. Martinez*, No. 930828 (Harris County Dist. Ct. May 19, 2003). At police headquarters, Officer Sosa and Officer Toby Hernandez "questioned [respondent] about the robbery and murder." Pet. App. 4. Respondent "denied knowing anything about the incident." *Id.*

The officers then subjected respondent to a polygraph examination, which someone else apparently administered and which "took three to four hours to complete." *Id.* Once again, no one advised respondent of his *Miranda* rights. Tr. of Proceedings at

19, 33-34, 45-46, 49, *State v. Martinez*, No. 930828 (Harris County Dist. Ct. May 19, 2003). Afterwards, Officer Sosa told respondent that he had "failed" the polygraph examination. Pet. App. 4.

Immediately following the polygraph examination (and seven hours after the initial interrogation began), the officers took respondent to municipal court, where a magistrate judge gave him *Miranda* warnings for the first time. *Id.* at 5, 21. Respondent was promptly transferred to the central holding station, where Officers Sosa and Hernandez "again questioned [him] about the robbery and murder." *Id.* at 5. This time, Officer Sosa began by reading *Miranda* warnings, but he did not inform respondent that neither his statements from the initial interrogation nor from the polygraph examination could be used against him. *Id.* at 23. To the contrary, Officer Sosa "referred to the first interrogation and restated what he had told [respondent] during the first interview." *Id.* at 22. The officers also referred to "the polygraph examiner, and the facts learned by [respondent] from the polygraph examiner." *Id.* at 23. Respondent gave a videotaped statement in which he stated that he "had become aware of certain facts about the crime through the polygraph examiner," claimed to have been a "'lookout' person" during the incident, and asserted that he "could easily have been mistaken" for the gunman. Pet. App. 5-6.

Before trial, respondent filed a motion to suppress his videotaped statement, arguing that the statement was inadmissible because the officers had deliberately and inexcusably failed to administer *Miranda* warnings upon his arrest or before the polygraph examination, and had failed to cure those Fifth Amendment violations before questioning him a third time. *Id.* at 6. Following an evidentiary hearing, the trial court

denied respondent's motion. Specifically, the trial court ruled that respondent's statement during the third interrogation was admissible because he had "freely, voluntarily and knowingly waive[d] his rights to remain silent and give[n] that statement." Tr. of Proceedings at 61, *State v. Martinez*, No. 930828 (Harris County Dist. Ct. May 19, 2003).

At trial, respondent was convicted of capital murder and sentenced to life in prison. Pet. App. 1-2.

2. The Texas Court of Appeals for the Thirteenth District affirmed in a divided opinion. The majority held that the videotaped statement followed an effective *Miranda* warning, and thus that admission of the statement did not violate respondent's constitutional rights. Pet. App. 6

3. The Court of Criminal Appeals of Texas granted discretionary review and reversed on three grounds. First, the court held that the State had failed to satisfy its burden of proving that respondent knowingly and voluntarily waived his *Miranda* rights. *Id.* at 16-18. The Texas Rules of Evidence require the proponent of evidence to lay an adequate foundation for its legal admissibility. Pet. App. 17 (citing Tex. R. Evid. 104(a)). Furthermore, this Court held in *Oregon v. Elstad*, 470 U.S. 298 (1985), that when a suspect was not read his *Miranda* rights before an initial interrogation, the prosecution must show that the initial interrogation did not taint post-warning statements. *See also Miranda*, 384 U.S. at 478-79 (effectiveness of waiver must be "demonstrated by the prosecution"). But here, the Court of Criminal Appeals explained that the State did not introduce "a complete, or even partial, description of the questions and answers in the first round of interrogation and polygraph test." Pet. App. 17. Furthermore, the Court of

Criminal Appeals noted that "[a]t the suppression hearing, the state failed to provide the polygrapher's name, the questions used during the polygraph examination, or the content of the initial interrogation of [respondent], all of which are under the exclusive control of the state." *Id.* at 18. That being so, there was no way the State could prove that the officers initial interrogations of respondent did not taint the post-warning questioning.

Second, the Court of Criminal Appeals held that the officers' use of the question-first method rendered respondent's statements inadmissible under this Court's intervening decision in *Missouri v. Seibert*, 542 U.S. 600 (2004). In *Seibert* this Court held that *Miranda* warnings inserted "in the midst of coordinated and continuing interrogation" cannot function effectively absent specific, curative steps to remove the taint of the prior unwarned questioning. 542 U.S. at 613-14 (plurality opinion); *see also Id.* at 621 (Kennedy, J., concurring in the judgment). The Court of Criminal Appeals determined that the circumstances of respondent's interrogation mirrored those in *Seibert*: "Here, [respondent] was in custody for the purposes of *Miranda*; he gave both statements to law-enforcement officials after his formal arrest pursuant to an arrest warrant, and both statements were given at a police station." Pet. App. 19-20. Furthermore, "the absence of *Miranda* warnings at the beginning of the interrogation process was not a mistake based on the interrogating officers' mistaken belief that [respondent] was not in custody, but rather a conscious choice." *Id.* at 20. Applying factors and analysis from both the *Seibert* plurality opinion and Justice Kennedy's concurrence,[1] the Court of Criminal

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[1] *See, e.g.*, Pet. App. 20-21 n.17 (quoting language from both the *Seibert* plurality opinion and Justice Kennedy's concurrence as support for the conclusion that a "substantial break" between respondent's interrogations did not occur); *id.* at 21-26 (applying factors from both the *Seibert* plurality opinion and Justice Kennedy's concurrence); *id.* at 24 & n.20 (quoting language from both the *Seibert* plurality and Justice Kennedy to support the

Appeals concluded that a "substantial break" between the interrogations had not occurred, and the officers had not taken curative steps to render effective their belated administration of *Miranda* warnings. *Id.* at 20-26.

Third, citing Texas law, the Court of Criminal Appeals held that "the officers had the responsibility to inform appellant that the questions asked during [the] polygraph test, or the test results, could be used at trial and that any mention of the test at trial was likewise prohibited." *Id.* at 23-24. Yet the officers "failed to inform [respondent] that he could refuse to take the polygraph test or that, after starting the test, he could stop at any time." *Id.* at 23. They also failed to advise him while referring to the polygraph during later questioning that the polygraph was inadmissible. *See id.*

Judge Price filed a concurring opinion, emphasizing that "the State itself has never complained that it has been saddled with an inappropriate burden of proof in this case." Pet. App. 28. He also explicitly stated that he believed respondent's statements were inadmissible under *Seibert*'s plurality opinion and Justice Kennedy's concurrence. *Id.* at 29.

Judge Hervey and three other judges dissented. The dissent agreed that the record was inadequate to determine what happened during respondent's initial interrogation and polygraph, but disagreed that the State should be penalized for this inadequacy. The dissent also agreed that "it is unnecessary to determine whether Justice Souter's or Justice

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conclusion that the interrogations "likely created the belief in [respondent's] mind that he was compelled to again discuss the matters raised in the first interview during the second interview."); *see also id.* at 19 (noting that both the *Seibert* plurality and Justice Kennedy were concerned with "the constitutional rights that the *Miranda* decision was intended to protect").

Kennedy's plurality opinions in *Seibert* control the disposition of this case." *Id.* at 37. Yet it believed that the State should prevail under either opinion.

REASONS FOR DENYING THE WRIT

The State asks this Court to apply its decision in *Missouri v. Seibert*, 542 U.S. 600 (2004), to the facts of this case and to hold that the reasoning in Justice Kennedy's concurrence in that case is irrelevant to whether *Miranda* warnings given during a question-first interrogation are sufficient to render post-warning statements admissible. This Court should deny the petition because the Texas Court of Criminal Appeals correctly applied *Seibert*. Nor is there any meaningful conflict in authority regarding how to apply that decision. The vast majority of courts applying *Seibert* have applied factors and analysis from *both* the plurality opinion and Justice Kennedy's concurrence, and no court has decided a case in which strict application of either opinion was outcome determinative.

Even if there were meaningful confusion over *Seibert* in the lower courts, this case would be a poor vehicle for resolving it. First, all of the judges on the Texas Court of Criminal Appeals agreed that this case should come out the same way regardless of whether one of the two *Seibert* opinions exclusively governs question-first interrogations. Second, as the Court of Criminal Appeals expressly noted, "the record is lacking" in this case because it was developed prior to *Seibert* being decided; it is missing "a complete, or even partial, description of the questions and answers in the first round of interrogation and polygraph test," as well as critical information regarding the second round of interrogation. Pet. App. 17. Third, even setting *Seibert* aside, respondent's statement must be suppressed because the State failed to offer evidence sufficient to discharge its

burden under state (as well as federal) law of proving that respondent knowingly and voluntarily waived his *Miranda* rights. Fourth, the officers' failure to advise respondent that his polygraph examination results were inadmissible provides an adequate and independent state-law ground for excluding respondent's later statements.

I. The Texas Court Of Criminal Appeals' Application Of *Seibert* Is Correct

The Texas Court of Criminal Appeals correctly held that this Court's decision in *Seibert* precludes the prosecution from introducing respondent's post-warning statement in its case-in-chief.

1. As the Court of Criminal Appeals recognized, the admissibility of respondent's post-warning statement turns on this Court's decisions in *Seibert* and *Elstad*. In *Elstad*, the defendant made a cursory, one-sentence inculpatory statement in his own living room, before his arrest. 470 U.S. at 300-01. The officer's failure to provide *Miranda* warnings was an "oversight" apparently due to "confusion" as to whether the defendant was actually in custody at the time. *Id.* at 315-16. Officers transported the defendant to the police station where, an hour later, a different officer read him his *Miranda* warnings. *Id.* at 301. The defendant made a full confession that went far beyond the initial statement he provided in his living room. *See id.* at 301-02. This Court held that the defendant's post-warning confession should not be suppressed solely because he had made an unwarned inculpatory statement. *Id.* at 318.

The interrogation in *Seibert* represented the "opposite extreme." 542 U.S. at 616 (plurality opinion). The defendant in *Seibert* confessed during an initial interrogation conducted at the police station, before any *Miranda* warnings. *Id.* at 604-05 (plurality opinion). After a short break, the same police officer gave defendant her *Miranda* warnings, and continued the interrogation, in the same location, eliciting a confession that

was "'largely a repeat of information . . . obtained' prior to the warning." *Id.* at 605-06 (plurality opinion). In contrast to *Elstad*, the omission of *Miranda* warnings was not an "oversight," and there was no confusion regarding whether defendant was in custody. *See id.* at 616 (plurality opinion). The Court thus held that defendant's post-*Miranda* confession was inadmissible.

In this case, the Court of Criminal Appeals correctly held that the *Miranda* warnings were ineffective. The evidence shows that "the officers treated the video-taped interrogation as a continuation of the first; as in *Seibert*, Officer Sosa referred to the first interrogation and restated what he had told [respondent] during the first interview." Pet. App. 22. Additionally, "the polygraph examiner, and the facts learned by [respondent] from the polygraph examiner, were mentioned by [respondent] and the officers in the video." Pet. App. 23. Indeed, the facts of this case are even more egregious than those of *Seibert*. The officers subjected respondent to *two* unwarned interrogations (the initial interrogation and then the polygraph examination), and did not administer *Miranda* warnings until approximately *seven hours* had elapsed. Pet. App. 5, 21.

The Court of Criminal Appeals also correctly noted, in the words of the *Seibert* concurrence, that "the two-step interrogation technique was used in a calculated way to undermine the *Miranda* warning." 542 U.S. at 622 (Kennedy, J., concurring in the judgment); *see* Pet. App. 20. Even though the officers knew respondent was in custody, Tr. of Proceedings at 38-39, *State v. Martinez*, No. 930828 (Harris County Dist. Ct. May 19, 2003), they nonetheless "questioned [him] about the robbery and murder." Pet. App. 4. There is nothing in the record indicating that the omission of *Miranda* warnings for seven hours was an "oversight." As the Court of Criminal Appeals concluded, "[t]his

indicates that the absence of *Miranda* warnings at the beginning of the interrogation process was not a mistake based on the interrogating officers' mistaken belief that [respondent] was not in custody, but rather a conscious choice." Pet. App. 20.

2. The State does not dispute that the officers in this case deliberately withheld *Miranda* warnings during the first two rounds of respondent's interrogation, in a calculated attempt to evade *Miranda*. It nonetheless contends, for three reasons, that the Texas Court of Criminal Appeals' holding misapplied *Seibert*. None of the State's arguments have merit.

a. The State argues that the *Seibert* plurality opinion renders officers' intent to evade *Miranda* irrelevant and that the officers' midstream warnings were effective in this case. This argument misconstrues the *Seibert* plurality opinion, which condemned the deliberate use of question-first tactics. *See* 542 U.S. at 613-14. The plurality simply further recognized that "[b]ecause the intent of the officer will rarely be as candidly admitted" as it was in *Seibert*, it is appropriate to focus on "facts apart from intent that show the question-first tactic at work." *Id.* at 616 n.6. In other words, the plurality's approach does not *require* evidence of an officer's deliberate intent to evade *Miranda*, but such evidence is nonetheless *sufficient* to demonstrate the ineffectiveness of midstream warnings. Where, as here, the evidence shows that "the absence of *Miranda* warnings at the beginning of the interrogation process was . . . a conscious choice," Pet. App. 20, that evidence is relevant and any post-warning statements must be suppressed under either the plurality opinion or Justice Kennedy's concurrence.

b. The State also asserts that the Texas Court of Criminal Appeals "misstated and misapplied a rule of law in holding that the substance of any pre-warning statements is

'immaterial.'" Pet. 24. Under the State's reasoning, "the presence of prewarning incriminating statements was crucial to this Court in *Seibert*," Pet. 23, so the Court of Criminal Appeals erred here by construing the sparse evidentiary record against the State. In essence, the State argues that respondent cannot prevail under *Seibert* because the record contains absolutely no evidence regarding the substance of the pre-warning interrogations (*i.e.*, whether inculpatory statements were made).

This argument turns the State's well-established burden of proof on its head. As elaborated *infra* at 16, the State has the burden to demonstrate the effectiveness of *Miranda* warnings, and the validity of defendant's waiver. In this case, the State failed to provide crucial evidence and testimony at the suppression hearing regarding the substance of respondent's pre-warning statements–evidence and testimony readily available to the State. It cannot now shift its "heavy burden" to respondent. *See Colorado v. Connelly*, 479 U.S. 157, 167-68 (1986); *Miranda*, 384 U.S. at 478-79. If anything, these arguments regarding the inadequacy of the record further demonstrate why the State cannot prevail in this case, under any reading of *Seibert*.

c. Finally, the State argues that the magistrate's issuance of *Miranda* warnings between the polygraph examination and the videotaped statement qualifies as "curative measures," and constitutes a "substantial break in time and circumstances," rendering the midstream *Miranda* warnings effective. Pet. 25-26. The Texas Court of Criminal Appeals correctly rejected this argument. Pet. App. 20-26.

There was no substantial break in continuity between the interrogations. As this Court held in *Seibert*, "it would ordinarily be unrealistic to treat two spates of integrated and proximately conducted questioning as independent interrogations subject to

independent evaluation simply because *Miranda* warnings formally punctuate them in the middle." 542 U.S. at 614 (plurality opinion); *see also id.* at 620 (Kennedy, J., concurring in the judgment) (noting that the two-step interrogation strategy "is based on the assumption that *Miranda* warnings will tend to mean less when recited mid-interrogation, after inculpatory statements have already been obtained."). The Court of Criminal Appeals correctly noted that "[d]etermining whether a suspect was in the continuous presence of police personnel cannot be accomplished by focusing on only the lapse of time between the two statements." Pet. App. 21. Instead, a "substantial break in time and circumstances" exists only when it "ensure[s] that a reasonable person in the suspect's situation would understand the import and effect of the *Miranda* warning and of the *Miranda* waiver." *Seibert*, 542 U.S. at 622 (Kennedy, J., concurring in the judgment). As the record shows, "[t]he interrogation process was lengthy," and "[f]rom arrest to questioning to polygraph to magistration to questioning, the presence of police personnel was uninterrupted." Pet. App. 21-22. A magistrate's recitation of *Miranda* warnings cannot be effective when it immediately follows seven hours of interrogation, and then in turn is immediately followed by another interrogation on the exact same subject by the same officers, with no warning to the defendant that his or her prior statements are likely inadmissible.[2]

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[2] In support of its argument, the State also invites this Court to rely on "precedent in analogous situations, such as a confession given after an illegal arrest." Pet. 26. This Court has repeatedly recognized, however, that the exclusionary rules of the Fourth and Fifth Amendments have fundamentally different purposes and underlying rationales. *See, e.g.*, *Elstad*, 470 U.S. at 304 (emphasizing the "fundamental differences between the role of the Fourth Amendment exclusionary rule and the function of *Miranda* in guarding against the prosecutorial use of compelled statements as prohibited by the Fifth Amendment"). "The Fifth Amendment prohibits use by the prosecution in its case in chief only of *compelled* testimony," including unwarned statements. *Id.* at 306-07

Even if there had been a substantial break in the respondent's interrogation, the Court of Criminal Appeals also correctly concluded that "[n]o curative steps were taken in this case." Pet. App. 26. The officers here did not give "an additional warning that explains the likely inadmissibility of the prewarning custodial statement," *Seibert*, 542 U.S. at 622 (Kennedy, J., concurring in the judgment), nor was anything "said or done to dispel the oddity of warning about legal rights to silence and counsel right after the police had led [respondent] through a systematic interrogation." *Id.* at 616 (plurality opinion). Instead, Officers Sosa and Hernandez made "references back" to the prior interrogations. *Id.* at 616; *see also* Pet. App. 22-23. In these circumstances, "a reasonable person in [respondent's] situation" undoubtedly would not "understand the import and effect of the *Miranda* warning." *Seibert*, 542 U.S. at 622 (Kennedy, J., concurring in the judgment).

II. The State Exaggerates The Situation In The Lower Courts Concerning Applications of *Seibert*

The State asserts that a split in authority exists in that "many courts" have held that Justice Kennedy's *Seibert* concurrence exclusively governs question-first cases, while "other courts have recognized that the holdings themselves are more complex than that." Pet. 20. This argument distorts reality. No significant disagreement exists regarding *Seibert*.

1. Court after court has determined, like the Texas Court of Criminal Appeals in this case, that question-first cases after *Seibert* come out the same way regardless of whether one applies *Seibert*'s plurality's opinion, Justice Kennedy's opinion, or an

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(emphasis in original). In contrast, "[t]he purpose of the Fourth Amendment exclusionary rule is to *deter unreasonable searches*, no matter how probative their fruits." *Id.* at 306 (emphasis added). Accordingly, Fourth Amendment law has no application here.

amalgam of the two.[3] While Justice Kennedy in *Seibert* placed more emphasis on the police officers' intent to evade *Miranda*, both his opinion and the plurality's require officers who fail to give *Miranda* warnings at the outset of interrogations to give "curative measures," and those curative measures are nearly identical to the objective factors given by the plurality opinion as part of its threshold "effectiveness" inquiry. *Compare Seibert*, 542 U.S. at 615-16 (plurality opinion), *with id.* at 622 (Kennedy, J., concurring in the judgment). It thus is no surprise that the State does not point to any decision in which a court has found that choosing between the plurality or Justice

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[3] *See, e.g.*, *United States v. Heron*, 564 F.3d 879, 885 (7th Cir. 2009) ("[Defendant's] statements would be admissible under any test one might extract [from *Seibert*]."); *United States v. Pacheco-Lopez*, 531 F.3d 420, 427 n.11 (6th Cir. 2008) ("We do not need to resolve this issue because regardless of the applicable framework [defendant's] statement must be suppressed."); *United States v. McConer*, 530 F.3d 484, 498 (6th Cir. 2008) (holding that defendant's statements were admissible under both the plurality test and Justice Kennedy's test); *United States v. Carrizales-Toledo*, 454 F.3d 1142, 1151 (10th Cir. 2006) ("This case does not require us to determine which opinion reflects the holding of *Seibert*" because defendant's statements "would be admissible under the tests proposed by the plurality and by the concurring opinion."); *United States v. Gonzalez-Lauzan*, 437 F.3d 1128, 1137-39 (11th Cir. 2006) (holding that defendant's statements were admissible under both the plurality and Justice Kennedy's test); *United States v. Terry*, 400 F.3d 575, 582 (8th Cir. 2005) (same); *United States v. Fellers*, 397 F.3d 1090, 1098 (8th Cir. 2005) (same); *United States v. Briones*, 390 F.3d 610, 613-14 (8th Cir. 2004) (same); *United States v. Aguilar*, 384 F.3d 520, 525 (8th Cir. 2004) (holding that post-warning statements were inadmissible under both the plurality opinion's approach and Justice Kennedy's test); *United States v. Stewart*, 388 F.3d 1079, 1090 (7th Cir. 2004) (noting that when two-step interrogation is deliberate, "the analysis of the *Seibert* plurality and Justice Kennedy's concurrence merge"); *Edwards v. United States*, 923 A.2d 840, 853 (D.C. 2007) (holding that defendant's statements were inadmissible, and concluding that "[t]he result is the same under the plurality's test as under Justice Kennedy's test."); *Alkahala-Sanchez v. Commonwealth*, 255 S.W.3d 916, 922 (Ky. 2008) (applying both the *Seibert* plurality and Justice Kennedy's concurring opinion, and holding that defendant's statements were admissible); *People v. Paulman*, 833 N.E.2d 239, 247 (N.Y. 2005) ("Because the statements in this case are admissible under the plurality's more stringent test, they are necessarily admissible under Justice Kennedy's analysis."); *State v. Dailey*, 273 S.W.3d 94, 107 (Tenn. 2009) ("In this case, we again determine that it is unnecessary to predict the eventual outcome of the competing *Seibert* approaches because we find that the Defendant's post-warning confession is inadmissible under either the plurality's or Justice Kennedy's test.").

Kennedy's opinion was outcome determinative - much less a decision applying the plurality opinion in a way that shows it would have decided this case differently.

Indeed, the only decision the State cites in support of its claim that some lower courts have held that Justice Kennedy's concurrence is irrelevant to applying *Seibert* is *State v. Pye*, 653 S.E.2d 450 (Ga. 2007). But there, the Georgia Supreme Court held that *Seibert* required the statement at issue to be *suppressed* because the officers conducted a two-step procedure "without *any* break in the proceedings" and obtained *identical* statements. *Id.* at 454-55 (emphasis added). Accordingly, the court had no need to consider reaching the outcome that the State propounds here – namely, that *Seibert* allows the prosecution to admit statements obtained in deliberate violation of *Miranda* if it can prove that the midstream warnings the officers gave were somehow still effective.

III. This Case Is A Poor Vehicle For Giving Guidance Concerning Applying *Seibert*

Even if there were meaningful confusion among state and federal courts regarding how to apply *Seibert*, this case would present a poor vehicle for addressing it.

1. As the concurring and dissenting judges on the Court of Criminal Appeals recognized, this case does not turn on whether the plurality or Justice Kennedy's opinion in *Seibert* exclusively governs question-first cases. Pet App. 29 (Price, J., concurring) ("[W]e do not need to reach the issue of which opinion is controlling, since, in my view, the appellant should prevail under either test"); *id.* at 37 (Hervey, J., dissenting) ("[I]t is unnecessary to determine whether Justice Souter's or Justice Kennedy's plurality opinions in *Seibert* control the disposition of this case . . . ."). To be sure, the majority of the Court of Criminal Appeals at one point described the reasoning of Justice Kennedy's concurrence as "persuasive." Pet. App. 12. Yet it did not explicitly adopt that approach

to the exclusion of the plurality's, much less hold, as the State would have it, that the officers' subjective intent alone was enough to render respondent's post-warning statement inadmissible. To the contrary, the Court of Criminal Appeals repeatedly applied factors and analysis from *both* the *Seibert* plurality opinion and Justice Kennedy's concurrence. *See, e.g.*, Pet. App. 21-26; *see also supra* at 4 n.1. This shows beyond any doubt that it does not matter here which opinion is deemed "controlling," or how their analyses are melded together.

2. This case lacks an appropriate evidentiary record for giving any meaningful guidance regarding how to apply *Seibert*. This Court has repeatedly recognized that the development of constitutional principles is best undertaken in the context of concrete cases with fully developed records. *See, e.g.*, *Illinois v. Gates*, 462 U.S. 213, 221 (1983); *Massachusetts v. Painten*, 389 U.S. 560, 561 (1968) (per curiam). The suppression hearing in this case was held *before* this Court's *Seibert* decision. The Court of Criminal Appeals explained that "the record is lacking: it does not contain a complete, or even partial, description of the questions and answers in the first round of interrogation and polygraph test." Pet. App. 17; *see also id.* at 29 (Price, J., concurring) ("[W]e know almost nothing on the present record about the substance of the initial interrogation or the polygraph examination."); *id.* at 63 (Hervey, J., dissenting) (noting that the record is "incomplete" with "gaping holes of silence on critical issues"). If this Court does decide someday to elaborate on *Seibert*, it should do so in a case in which officers conducted their interrogation in the post-*Seibert* world, and in which the trial court applied factors from the *Seibert* decision to a full factual record.

3. It is also unlikely that this Court would even need to engage in any serious *Seibert* analysis in order to affirm here. The Court of Criminal Appeals held that deficiencies in the record prevented the State from meeting its threshold burden under state law of establishing the admissibility of the evidence it proffered. Pet. App. 17 (citing Tex. R. Evid. 104(a)). Thus, the State's inability to meet its burden of proof under state law is dispositive in this case. *Id.* at 17-18.

Even apart from this state law deficiency, the State failed to carry its burden of proof under federal law. This Court has held that the government has the burden to establish that it obtained a valid waiver of the right against self-incrimination. *Connelly*, 479 U.S. at 167-68. This includes the government's burden of demonstrating the effectiveness of *Miranda* warnings: "[U]nless and until such warnings and waiver are *demonstrated by the prosecution* at trial, no evidence obtained as a result of interrogation can be used against [defendant]." *Miranda*, 384 U.S. at 478-79 (emphasis added); *see also Moran v. Burbine*, 475 U.S. 412, 421 (1986) ("[T]he waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it."). "Since the State is responsible for establishing the isolated circumstances under which the interrogation takes place and has the only means of making available corroborating evidence of warnings given during incommunicado interrogation, the burden is rightly on its shoulders." *Miranda*, 384 U.S. at 475.

The Texas Court of Criminal Appeals correctly concluded that the record in this case lacks evidence on many factors relevant to the determination of whether respondent received effective warnings under *Seibert*. *See* Pet. App. 17-18 ("At the suppression

hearing, the state failed to provide the polygrapher's name, the questions used during the polygraph examination, or the content of the initial interrogation of appellant, all of which are under the exclusive control of the state."). On this record, the State cannot meet its threshold burden of demonstrating that respondent knowingly and voluntarily waived his *Miranda* rights.

4. Finally, it is unnecessary for this Court to reach the questions presented because an additional independent and adequate state-law ground supports the judgment of the Court of Criminal Appeals. As the Court of Criminal Appeals explained, "the officers had the responsibility" under state law "to inform [respondent] that the questions asked during the polygraph test, or the test results, could be used at trial and that any mention of the test was likewise prohibited." Pet. App. 23-24 (citing Tex. Code Crim. Proc. art. 15.051). Under state law "references to a polygraph test, or to its results, are inadmissible for all purposes." *Id.* at 23 (citing *Nesbit v. State*, 227 S.W.3d 64, 66 (Tex. Crim. App. 2007)). Yet the officers failed to advise respondent that his polygraph results were inadmissible, and the videotaped interrogation that the State introduced contained references to respondent's polygraph examination. Pet. App. 23. This error alone requires reversal of respondent's conviction. *See, e.g.*, *Nichols v. State*, 378 S.W.2d 335, 337 (Tex. Crim. App. 1964) (reversing conviction based on trial testimony disclosing that polygraph test had been taken; fact of polygraph test was "highly prejudicial to the rights of [defendant], and the harm done was so great that no instruction from the court could remove it.").

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

RESPECTFULLY SUBMITTED this 16th day of June, 2009.

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